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**In the**  
**Supreme Court of the United States**  
**OCTOBER TERM, 1991**

**JOHN W. GUMBY, SR., et al.,**

**Petitioners,**

**v.**

**GENERAL PUBLIC UTILITIES CORPORATION, METRO-  
POLITAN EDISON CO., JERSEY CENTRAL POWER AND  
LIGHT CO., PENNSYLVANIA ELECTRIC CO., BABCOCK  
& WILCOX CO., McDERMOTT INC., U.E. & C.-CATA-  
LYTIC, INC., BURNS & ROE ENTERPRISES, INC., AND  
DRESSER INDUSTRIES INC.,**

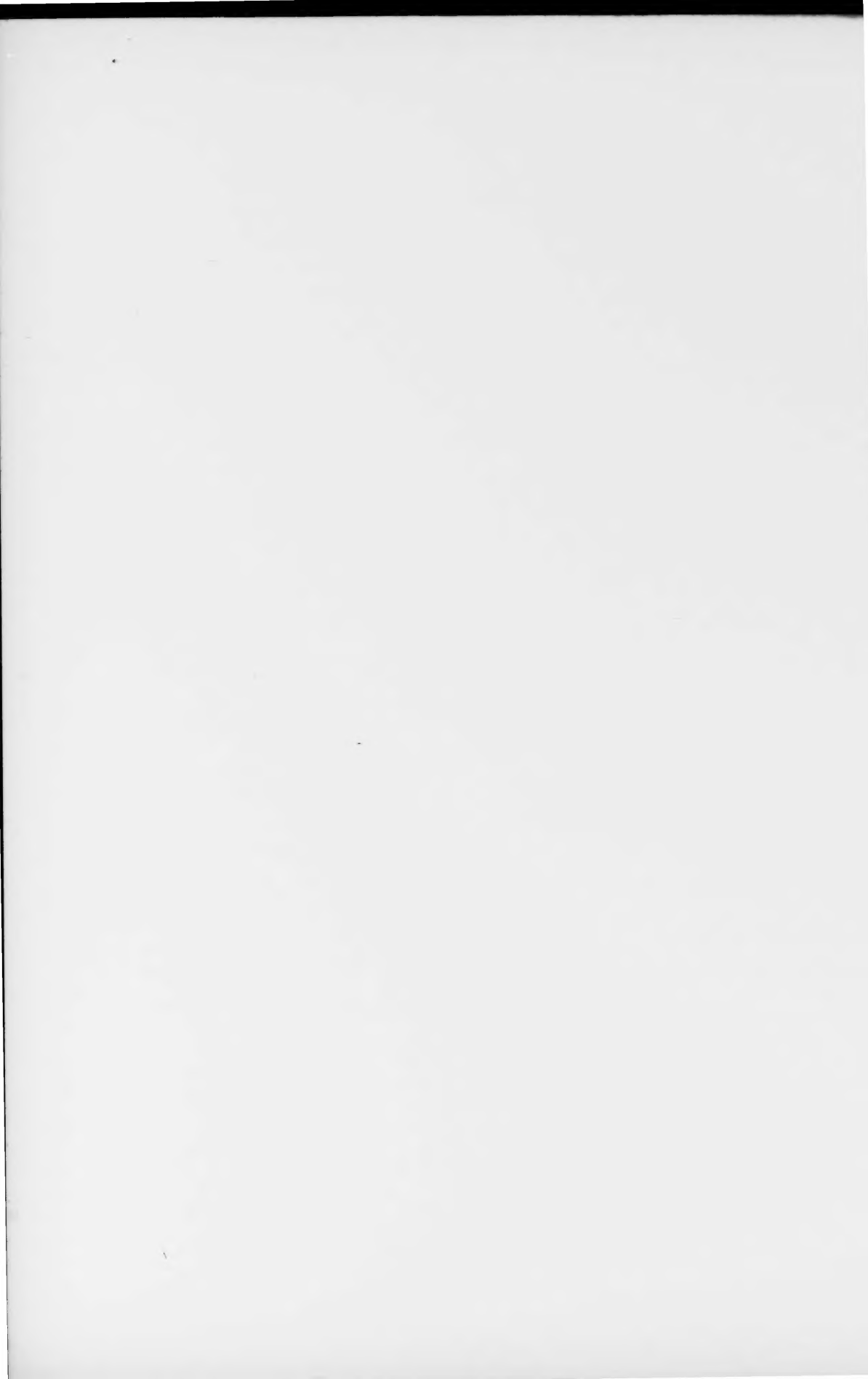
**Respondents.**

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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October 23, 1991





## QUESTIONS PRESENTED

1. Does the Third Circuit's grant of appellate jurisdiction over certain interlocutory orders contained in 28 U.S.C. §1292(b) create a new, previously unrecognized exception to the express statutory prohibition against review of remand orders "on appeal or otherwise" contained in 28 U.S.C. §1447(d) in conflict with decisions by the Fifth, Ninth and Tenth Circuits and in conflict with this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1975)?

2. May Congress, pursuant to the Price-Anderson Amendments Act of 1988, 42 U.S.C. §2210(n)(2), confer original jurisdiction on the federal courts consistent with Article III's "arising under" clause:

- (a) When Congress intended for state law to provide the substantive rules of decision rather than legislating federal rules of decision;
- (b) When Congress intended that there be concurrent (not exclusive) jurisdiction between the state and federal courts;
- (c) When Congress, by granting only concurrent jurisdiction, did not intend that there be a uniform body of federal law applicable to public liability actions; and
- (d) When state law remains the independent source of the private rights at issue?

3. Did Congress impermissibly exercise the Article III judicial function or interfere with state sovereignty and federalism by declaring these state law claims as federal causes of action and retroactively providing a federal forum without changing the substantive applicable law, although courts have previously determined that these cases comprise entirely state law claims?

## **LIST OF INTERESTED PARTIES**

The interested parties, petitioners, who appeared before the United States Court of Appeals for the Third Circuit in this proceeding are listed in the Appendix at A-1-A-22.<sup>1</sup> All respondents appear in the caption of the case.

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1. Pursuant to Sup.Ct.R. 29.1, Petitioners state that all corporate petitioners have no parent companies or subsidiaries to be listed.

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Petitioners, John W. Gumby, Sr., et al., ("Petitioners"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of a panel of the United States Court of Appeals for the Third Circuit, which reviewed and reversed an Order of the United States District Court for the Middle District of Pennsylvania remanding these proceedings for lack of subject matter jurisdiction.

## **OPINIONS BELOW**

The majority and concurring opinions of the United States Court of Appeals for the Third Circuit, reproduced at A-23-A-138, are reported at 940 F.2d 832 (3d Cir. 1991). The opinion and orders of the United States District Court for the Middle District of Pennsylvania, dated March 16, 1990, are reproduced at A-139-A-158, and reported at 735 F.Supp. 640 (M.D. Pa. 1990). The opinion of the United States District Court for the Middle District of Pennsylvania dated June 14, 1990, on reconsideration is reproduced at A-159-A-161, and is not reported.

## **JURISDICTION**

The judgment of the Court of Appeals was entered on July 26, 1991. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1).

## **CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE**

The text of the United States Constitution, Article III, Section 2, Clause 1, 28 U.S.C. §1447(c), 28 U.S.C. §1447(d), 42 U.S.C. §2014(hh) and 42 U.S.C. §2210(n)(2) are set forth in the Appendix at A-162, A-162, A-162, A-163 and A-163, respectively.

## **STATEMENT OF THE CASE**

### **PRELIMINARY STATEMENT**

This case presents a unique opportunity for this Court to finally address the limitations of federal power and federal jurisdiction that lie at the heart of the Constitution. Never before has the fundamental constitutional issue embodied in Article III arrived before this Court in the procedural posture presented by this case. Thus this Court is in a position to rule on the constraints imposed by Article III as it has never done before.

Several important issues are raised but primarily there



are two: 1) The threshold issue of whether the scope of Congress's mandate that remand orders are not reviewable "on appeal or otherwise" precludes appellate review of a 1292(b) certified question concerning the constitutionality of an Act of Congress (here, the Price-Anderson Amendments Act of 1988); and 2) Whether there are any meaningful limitations to Article III "arising under" jurisdiction which preclude the federal government from divesting the states of their traditional authority to provide tort remedies to their citizens as well as exercising their jurisdiction over cases already proceeding under state tort law.

In this case, the Third Circuit recognized that the district court had properly issued its remand order on grounds within the statutory authority of the remand statute, §1447(c), by determining that it lacked subject-matter jurisdiction. However, because the district court's conclusion regarding its jurisdiction resulted from the determination that Congress exceeded its authority to grant federal jurisdiction, the Third Circuit found inapplicable the bar of §1447(d) precluding appellate review. The result-oriented Court of Appeals embarked on "virgin territory" to create a new exception to §1447(d) for instances when district courts make constitutional determinations for which the court of appeals wish appellate review. This judicial activism contravenes Congress's express intent and this Court's precedent to prevent review of remand orders by making the district courts the final arbiters of whether Congress intended that specific actions were to be tried in a federal court.

After creating its jurisdiction, the Third Circuit held that Congress may confer original jurisdiction on the federal courts over state law cases by simply decreeing that these actions now arise under a federal law, even though that law expressly relies on state law to provide the substantive rules of decision. Under this analysis, the bounds of Article III hold no limits on Congress's ability to confer original jurisdiction on the federal judiciary: Congress simply has to say jurisdiction exists for it to exist. However, as this Court has held, purely jurisdictional grants of federal jurisdiction such as the

Price-Anderson Amendments Act Of 1988 lack the necessary federal ingredient to create federal jurisdiction.

Review by this Court pursuant to a writ of certiorari is warranted because the Third Circuit's decision 1) conflicts with the decisions of other United States courts of appeals; 2) has impacted on important questions of federal law which have not been, but should be, settled by this Court; and 3) has decided a federal question in a way that conflicts with applicable decisions of this Court. *See* Rules of the Supreme Court of the United States ("Sup.Ct.R.") 10.1(a), (c). More specifically, review by this Court is warranted because:

- (1) The Third Circuit's holding that it has appellate jurisdiction pursuant to 28 U.S.C. §1292(b) conflicts with the decisions of the United States Court of Appeals for the Fifth Circuit in *Richards v. Federated Department Stores, Inc.*, 812 F.2d 211 (5th Cir. 1987), the Ninth Circuit in *Federal Savings and Loan Insurance Corp. v. Frumentti*, 857 F.2d 665 (9th Cir. 1988) and the Tenth Circuit in *In re Bear River Drainage Dist.*, 267 F.2d 849 (10th Cir. 1959);
- (2) The Third Circuit's statutory construction that the prohibition of appellate review of 28 U.S.C. §1447(d) permits review pursuant to 28 U.S.C. §1292(b) rather than by mandamus (a method of review not available here as remand was proper) conflicts with this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1975);
- (3) The Third Circuit's ruling that the Price-Anderson Amendments Act of 1988 creates original federal jurisdiction over state law cases reaches the question not addressed by this Court in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) and *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), *i.e.*, the precise limits of Article III and the extent to which Congress may confer federal jurisdiction over state law cases that will not necessarily implicate substantive federal questions;

- (4) The Third Circuit's finding that state sovereignty and federalism are not implicated when Congress, at the behest of industry lobbying, targets legislation to oust a state court of jurisdiction over specific cases after that jurisdiction has already been established and exercised, contravenes this Court's ruling in *Railway Company v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270 (1871).

### STATEMENT OF FACTS

These Pennsylvania and Mississippi cases redressing plaintiffs' state-created causes of action, predominantly personal injury tort claims, were filed following the Three Mile Island nuclear facility ["TMI"] disaster of March 28, 1979. The Respondents are the companies that, at the time of the disaster, were the owners, operators or suppliers of TMI.

Respondents removed these cases to the United States District Courts in Pennsylvania and Mississippi alleging that Plaintiffs' claims arose under the Price-Anderson Act [hereafter referred to as "the Act"]. 42 U.S.C. §2210. Following this Court's decisions in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98-99 (1978) (Rehnquist, J., concurring) and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251-54, 256 (1984), the Third Circuit twice ruled in *Stibitz v. General Public Utilities Corp.*, 746 F.2d 993, 997 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985) and *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490, 493 (3d Cir. 1986), that the Act created no federal tort causes of action and that there was no basis for federal jurisdiction for Petitioner's state law claims. Consequently, the actions were then remanded back to the state courts from which they were removed.

Following *Stibitz* and *Kiick*, Respondents lobbied Congress to amend the Act to authorize retroactive removal of all claims created by a "nuclear incident" (as opposed to an "extraordinary nuclear occurrence" as previously required) to a single federal court. *See* 42 U.S.C. §2210(n)(2). One of the chief purposes of the retrospective provision for which the Respondents lobbied is to justify an attempt to rob the Peti-

tioners filing under Mississippi's six-year limitations statute of cognizable, legitimate claims.<sup>2</sup> To further appease Respondents' desire to circumvent the Third Circuit's rulings in *Stibitz* and *Kiick*, Congress added that Petitioners' state-created claims were "public liability actions" which arise under federal law. See 42 U.S.C. §2014(hh). A-162. The Price Anderson Act Amendments of 1988 [hereafter referred to as the "Amendments"] became law on August 20, 1988.

Following the enactment of the Amendments, Respondents again removed these actions to the district court. Petitioners moved the district court for remand as Congress's amendments to the Act could not confer Article III jurisdiction without providing a substantive rule of decision in the Amendments, and Congress still relied on the substantive rules of decision of the fifty states to describe a public liability action. 42 U.S.C. §2014(hh). A-162. The Respondents opposed the petition and the United States of America intervened pursuant to 28 U.S.C. §2403 in the proceedings below.

On March 16, 1990, the lower court ruled that public liability actions are state-created causes of action:

In this case, the Act provides that public liability actions are deemed to "arise under" section 170 of the Atomic Energy Act of 1954 (42 U.S.C. §2210). The law of the state in which the nuclear incident occurs will govern the rules for decision in such cases unless the applicable state law is inconsistent with section 170. Consequently, Congress has not

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2. The Respondents have always revealed an intent to argue that once these claims have been removed to the federal courts in Pennsylvania that Pennsylvania's two year statute of limitations must apply. *But see Ferens v. John Deere & Co.*, 819 F.2d 423 (3d Cir. 1987), *vacated*, 487 U.S. 1212, *on remand*, 862 F.2d 31 (3d Cir. 1988), *rev'd*, — U.S. —, 110 S.Ct. 1275 (1990). Respondents' counsel confirmed this intent following the Third Circuit's opinion. See *The Patriot-News*, July 27, 1991, at A5 ("Alfred H. Wilcox, an attorney for GPU, reiterated that the main reason the utility wanted the cases heard in federal court was to better coordinate the proceedings. He said about 700 claims may be dropped because of the statute of limitations.").

“codifie[d] the standards” governing personal injury actions resulting from nuclear incidents “as an aspect of substantive federal law.” *Verlinden*, 461 U.S. at 497. On the contrary, this Act precludes a “standard” because of the variances in state tort laws. A-150.

The lower court continued:

Here, the right at issue is the right to bring an action for recovery of damages for alleged tortious injuries resulting from nuclear incidents. That right is created by state law and exists regardless of the provisions of the Act. A-152.

The lower court concluded that since no federal cause of action was created by the Amendments, no federal jurisdiction existed and it therefore lacked subject matter jurisdiction as required by 28 U.S.C. §1447(c). The actions were remanded for lack of subject matter jurisdiction pursuant to 28 U.S.C. §1447(d). A-139-A-140, A-153. Simultaneously, the lower court stayed its remand order and certified its constitutional ruling for interlocutory appeal. A-139-A-140.

The United States and the Respondents filed interlocutory appeals pursuant to 28 U.S.C. §1292(b). Respondents also filed notices of appeals on April 13, 1990. Petitioners and the United States filed in the district court motions for reconsideration. Petitioners sought to lift the stay of remand and certification for interlocutory appeal. The United States sought to have the district court issue an advisory opinion to end run the prohibition of appellate review of remand orders.

The Third Circuit, by order dated April 17, 1990, stayed the interlocutory appeals pending a ruling by the district court on the two motions for reconsideration. On June 14, 1990, the district court denied both motions. A-159. Respondents filed notices of appeal from the June 14, 1990 order. A petition for a Writ of Mandamus was also filed. On July 12, 1990, the Third Circuit consolidated the inter-

locutory appeals with the direct appeals and oral argument took place on February 7, 1991.

The Third Circuit in an opinion and judgment filed on July 26, 1991, reversed the district court. The Third Circuit made several rulings challenged herein: that despite finding that the district court's remand order was authorized by the removal statute, the prohibition against appellate review of remand orders did not apply; that Congress can confer Article III jurisdiction over federal courts of state-law causes of action without creating any federal substantive law; and that Congress, in conformity with constitutional principles of state sovereignty and federalism, may retrospectively divest a state court of jurisdiction of long-pending, properly filed, state law claims.

On August 14, 1991, Petitioners moved to stay the mandate of the Third Circuit. On August 30, 1991, the Third Circuit granted Petitioners' motion and stayed the mandate until October 24, 1991.

Petitioners now seek review of these actions in this Court.

## **REASONS FOR ALLOWING THE WRIT**

### **A. CHIEF JUSTICE REHNQUIST'S WARNING IN *THERMTRON* HAS COME TO FRUITION: THE THIRD CIRCUIT HAS RENDERED MEANINGLESS THE APPELLATE REVIEW PROHIBITION OF §1447(D) BY EXCEPTING INTERLOCUTORY REVIEW**

As then Justice Rehnquist, in his dissent in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 357 (1975) (Rehnquist, J.), warned of the mandamus exception engrafted upon the §1447(d) prohibition of appellate review of remand orders: "Such devices would soon render meaningless Congress's express, and heretofore fully effective, directive prohibiting such tactics because of their potential for abuse by those seeking only to delay." Here, the Third Circuit refused to heed this warning and recklessly created a new §1292(b)



exception to §1447(d)—a method of review not even permitted by the majority's holding in *Thermtron*.

Until the Third Circuit's opinion, it was always recognized, notwithstanding the limited *Thermtron* mandamus exception, that Congress's express prohibition of appellate review of remand orders means what it says, *i.e.*:

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it is removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

28 U.S.C. §1447(d). Thus, except in civil rights cases, appellate review of remand orders is forbidden, unless mandamus must be exercised to ensure that the district court's remand order complies with §1447(c).<sup>3</sup> *Thermtron*, 423 U.S. at 351. The Third Circuit does not agree with this interpretation and now advocates interlocutory appeals pursuant to §1292(b) whenever a district court "certifies an unsettled question of constitutional proportion." 840 F.2d at 848. A-66.

Congress, however, has for over 100 years intended that there be no doubt as to the finality of an order of remand to a

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3. Evident by the language of the statute itself, Congress clearly knows how to make exceptions to the prohibition of appellate review when it desires appellate review. Congress has created similar exceptions in other statutes. See *e.g.* The Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. §1819(b)(2)(C). This argument was not lost on the Third Circuit which in its drive to reach the merits of this case, ignored, as not being dispositive, Congress's omission of an exception to appellate review of a remand order to the Amendments. 940 F.2d 848 n.10. A-67. The Third Circuit also ignored this Court's directive that Congress's silence on the creation of federal jurisdiction must yield to the express language of the statute itself. See *e.g.* *Sedima, S.P.R.L. v Imrex Company, Inc.*, 473 U.S. 479, 495 n.13 (1985). In the present situation, Congress has balanced between appellate review and interference in the conduct of litigation commenced in state court. Appellate review lost that battle; it is not the Third Circuit's province to act as a super-legislature over Congress and rewrite the law. See *Sedima*, 473 U.S. at 499 ("Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress").

state court. See *e.g. Morey v. Lockhart*, 123 U.S. 56 (1887). Congress's clear purpose has been to avoid protracted disputes over questions of jurisdiction by allowing the district courts to be the final arbiters of removal disputes. Congress decided that the elimination of the delay caused by appellate review outweighs correcting the district courts' occasional errors in remand orders. Underlying Congress's decision is the fact that the removing party is not out of court, rather it is simply in a different forum than it would prefer.

This legislative scheme has been recognized by the Fifth Circuit to preclude review of remand orders where constitutional determinations are made by the district court. See *Richards v. Federated Department Stores, Inc.*, 812 F.2d 211 (5th Cir. 1987). Congress's intent to prevent appellate review of remand orders, even those which touch upon questions of constitutional proportions, is supported by the repeal of the specific statute that provided appellate review of any order of a federal court which found an Act of Congress unconstitutional. See 28 U.S.C. §1252, *repealed*, Pub.L. 100-352, §1, June 27, 1988, 102 Stat. 662. Thus, as this Court held in *Morey v. Lockhart*, 123 U.S. at 65:

It is difficult to see what more could be done to make the action of the [district] court final, for all the purposes of the removal, and not the subject of review in this court. First, it is declared that there shall be no appeal or writ of error in such a case; and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed.

Similarly, the Ninth and Tenth Circuits recognize that Congress intended to preclude appellate review of instances where the district court certifies questions pursuant to §1292(b). See *Federal Savings and Loan Insurance Corp. v. Frument*, 857 F.2d 665, 669 (9th Cir. 1988) and *In re Bear River Drainage Dist.*, 267 F.2d 849, 851 (10th Cir. 1959).

Nevertheless, despite the unambiguous bar to appellate review, the Third Circuit found that the statute's language,



"not reviewable on appeal or otherwise," does not preclude an interlocutory appeal on a certified question when the district court makes a constitutional determination. The Third Circuit's opinion irreconcilably conflicts with Congress's expressed intent and the Fifth, Ninth and Tenth Circuits, and ill-advisedly expands the jurisdiction of the Courts of Appeals. Contrary to the balancing inherent in Congress's enactment of §1447(d), the Third Circuit's judicial fiat plainly disregards Congress's expressed intent to prohibit appellate jurisdiction in its drive to reach the merits of the case. See 940 F.2d at 845-46. A-61-A-64. The Third Circuit plainly refused to acknowledge what had always been established law. In so doing, it created a loophole to appellate jurisdiction of unknown dimensions.

As readily evident from the Third Circuit's opinion, what is a "federal question" is not readily discernable. What the Third Circuit means by a "question of constitutional proportion" could easily confound the Courts of Appeals and district courts for years through countless appeals—all adding unnecessary delay to thousands of cases remanded but arguably touching on so-called "questions of constitutional proportion." Given the increasingly heavy dockets of the Courts of Appeals, the Third Circuit's ill-defined guideline for expanding appellate jurisdiction further is unwarranted, let alone being contrary to congressional intent.

Congress and this Court have clearly stated that appellate review of remand orders based on a jurisdictional determination will not be tolerated, regardless of whether the District Court's determination of its jurisdiction is right or wrong. See *Thermtron*, 423 U.S. at 343. See also *Volvo of America Corp. v. Schwarzer*, 429 U.S. 1331, 1332 (1976). These same rulings must apply even where the district court's jurisdictional determination is premised upon a question of constitutional proportion. Indeed, Congress has repealed appellate jurisdiction for orders which find Acts of Congress unconstitutional.

While, the Third Circuit may not agree with these directives, it may not judicially legislate them away. This Court should review this case to ensure that the congressional policy prohibiting appellate review of remand orders is not further

disrupted or eroded and to settle the inter-circuit conflict created by the Third Circuit's judicial activism.

**B. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THERE EXIST ANY MEANINGFUL LIMITS TO ARTICLE III, "ARISING UNDER" JURISDICTION**

Not since *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), has the issue of the limits of the Constitution, Article III "Arising Under" jurisdiction been specifically addressed by this Court. This case squarely presents that issue. As Circuit Judge Scirica recognized in his concurring opinion, "[t]his case, therefore, raises the question of the extent to which Congress may confer federal jurisdiction over state law cases that will not necessarily implicate substantive federal questions." 940 F.2d at 862. A-102.

This Court has long recognized that a mere jurisdictional grant by Congress is constitutionally deficient. *Osborn*, 22 U.S. at 827. Congress must go further than simply confer jurisdiction; it must provide some substantive matter determinative of the outcome. *Verlinden*, 461 U.S. at 496. Congress did not make the necessary effort in the Amendments; there is still no federal ingredient in the Petitioners' claims.

Both the Act and the Amendments express Congress's intent to encourage the development of the nuclear industry. However, as this Court held in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98-99 (1978) (Rehnquist, J., concurring) and *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251-54, 256 (1984) the Act did not create a federal cause of action. State law remedies, such as the Petitioners', were left undisturbed. Cf. *English v. General Electric Co.*, — U.S. —, 110 S.Ct. 2270, 2280 (1990). Those issues were litigated before the Third Circuit in *Stibitz* and *Kiick*. There, the Third Circuit also found that Petitioners' claims were state tort claims which did not raise a federal question. The Respondents then successfully lobbied Congress to change the Act. Congress enacted the Amendments which, in essence, purport to say that Petitioners' state law claims now

arise under federal law and confer original (albeit concurrent) jurisdiction on the federal courts. See 42 U.S.C. §§2014(hh), 2210(n)(2).

Query: Whereas before the Amendments no federal claims were present, can Congress now simply by saying that these same claims arise under federal law satisfy the Constitution? “[W]e are squarely presented with the question of defining the “gap” between the scope of the statutory grant and the limits of Article III.” 940 F.2d at 865. A-108. This important question of federal law can only be decided by this Court and should finally be settled by this Court.

If the Third Circuit is correct, then Congress is not limited by Article III, because Article III means nothing. Under the Third Circuit’s analysis, mere incantation of the magical words—“arising under”—satisfies Congress’s obligations to the Constitution. Surely, this is not the case. Yet, it remains uncertain how far Congress can go before it approaches the limit of the “arising under” clause. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492-93 (1983). See also *Mesa v. California*, — U.S. —, 109 S.Ct. 959, 968-69 (1989).

While there is no doubt that Congress would like to provide a federal forum to litigate these state law cases, is that enough? Must not Congress provide a substantive rule of decision for it to do so? If so, the legislative history of the Amendments and the concurring opinion of the panel below reveal that Congress did not make the necessary effort to satisfy the Constitution. See Report of Committee on Interior and Insular Affairs on HR 1414 (1988) at 18 (“Rather than designing a new body of substantive law to govern such cases, however, the bill provides that the substantive rules for decision in such actions shall be derived from the law of the State in which the nuclear incident involved occurs[.]”). See also 940 F.2d at 863 (“I believe Congress intended for state law, acting of its own force, to provide the rules of decision in public liability actions.”). A-105. The Amendments are nothing more than an attempt to adopt state law as federal law, which is contrary to this Court’s precedents. Among these are:

- *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 508 (1900) ("The recognition by Congress of local customs and statutory provisions as at times controlling the right of possession does not incorporate them into the body of Federal law").
- *Shulthis v. McDougal*, 225 U.S. 561 (1912) (A dispute regarding title to lands obtained by federal law does not raise a federal question).
- *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492-93 (1983)(Questioning the validity of such a broad application of Article III).

The Amendments do not express an intent to create a federal common law, a situation in which this Court has found a sufficient congressional intent to confer federal jurisdiction. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) (Congress intended to create a federal common law under the Taft-Hartley Act, 29 U.S.C. §185). Nor do the Amendments approach a recognized domain of exclusive federal interest, such as bankruptcy or federal lands. See *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949); *Rodrigue v. Aetna Casualty Co.*, 395 U.S. 352 (1969) (Congress intended for federal law to be supplemented by state law in the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.*).<sup>4</sup> In light of Congress's omissions, the legislative scheme of the Amendments lacks constitutional foundation and is contrary to this Court's precedent.

Given the determinant role state law plays in the Amendments, the scarce likelihood of a federal question ever coming into play in Petitioners' tort claims can not confer original jurisdiction. While Congress may have an interest or concern

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4. The Third Circuit, relying principally on *Rodrigue* found that the Amendments satisfied Article III. However, the federal interest underlying the Lands Act, *i.e.*, federal lands, has no comparable reference in the Amendments, which do not implicate any exclusive federal interest but rather address state law liability for the private nuclear industry. See *Silkwood*, *supra*; *Duke Power*, *supra*.

for uniform treatment of these cases,<sup>5</sup> that interest alone cannot confer jurisdiction without the concomitant creation of federal substantive law.

This Court should review this case to decide if Congress satisfied Article III.

**C. REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THE AMENDMENTS' RETROACTIVE CONFERRAL OF ARISING UNDER JURISDICTION INTERFERES WITH STATE SOVEREIGNTY AND FEDERALISM**

The Amendments were specifically targeted at this litigation. Congress specifically earmarked these cases for removal, by giving the Amendments retroactive effect.<sup>6</sup> See Report of Committee on Energy and Commerce on HR 1414 (1987) at 19 ("This ensures that claims arising from the 1979 Three Mile Island accident will be covered by these provisions"). Snatching this litigation out of the state courts, for no reason other than the nuclear industry's desire for a federal forum, is particularly offensive to our federal system of government and the autonomy of the independent sovereign states and does not satisfy any legitimate legislative purpose furthered by rational means. Therefore this case is contrary to this Court's decisions in *Railway Co. v. Whitton's Administrator*, 80 U.S. 270 (1872) and *Pension Benefit Guarantee Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984).<sup>7</sup>

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5. Congress's interest in uniformity is belied by its grant of concurrent rather than exclusive jurisdiction, and the fact that the states can handle these cases uniformly. For example, the Pennsylvania state courts have the ability to transfer like cases to one jurisdiction for disposition. Pa.R.Civ.P. 213.1.

6. Congress may have also contravened the separation of powers doctrine by directing the federal courts to find that a federal cause of action arising under the constitution exists in these cases, when, it has already been judicially determined that only a state tort claim is present. See *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 429 (1988) (Rehnquist, J., dissenting).

7. The First and Ninth Circuits found a limited exception for national security which satisfied a legitimate legislative purpose in *Hammond v.*

Congress can not exceed that degree of sovereignty not relinquished by the states. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 548-557 (1985). Here, Congress clearly has gone too far. The Amendments rob the state courts of their authority to hear cases and violate the principles of federalism embodied in the Tenth Amendment of the Constitution. The power to take pending cases away from a state court through legislative fiat is the power to destroy state governments and the principles underlying our federalist system. See Note, *Over-Protective Jurisdiction? A State Sovereignty Theory Of Federal Questions*, 102 Harvard L.Rev. 1948, 1961 (1989).

This Court should grant a writ of certiorari to review this important issue interfering with the delicate balance of our government.

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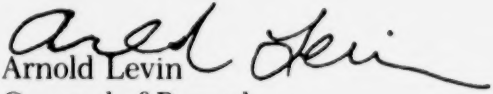
*United States*, 786 F.2d 8, 12 (1st Cir. 1986) and *In re Consolidated U.S. Atmospheric Testing Litigation*, 820 F.2d 982, 990 (9th Cir. 1987), cert. denied sub nom., *Konizeski v. Livermore Labs*, 485 U.S. 905 (1988). However, this Court in *Duke Power* found no similar exception for the private nuclear power industry.

# CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

/S/

  
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**In the  
Supreme Court of the United States**

**OCTOBER TERM, 1991**

**JOHN W. GUMBY, SR., et al.,**  
**Petitioners,**

**v.**

**GENERAL PUBLIC UTILITIES CORPORATION, METRO-  
POLITAN EDISON CO., JERSEY CENTRAL POWER AND  
LIGHT CO., PENNSYLVANIA ELECTRIC CO., BABCOCK  
& WILCOX CO., McDERMOTT INC., U.E. & C.-CATA-  
LYTIC, INC., BURNS & ROE ENTERPRISES, INC., AND  
DRESSER INDUSTRIES INC.,**  
**Respondents.**

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

**APPENDIX**

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October 23, 1991





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 Henrietta B. Adams; Jeanette M. Adams; Patricia A. Adams;  
 Blanche G. Albright; Estate of Ruth E. Alder;  
 Dorothy L. Aldrich; William A. Aldrich; Faith Alleman;  
 Gerald Alleman, Sr.; Byron L. Almone;   
 Georgia S. Almone; Kyle M. Almone, a minor;  
 Denise Altigieri; Denise Altigieri; Victor J. Altigieri;  
 Gary E. Altland; Miriam E. Altland; Annabelle Anderson;  
 Carl M. Anderson; Estate of Patrick Anderson;  
 George W. Anderson; Geraldine F. Anderson;  
 Gilbert C. Anderson; Pearl E. Anderson; Johanna Angeli;  
 Philip Angeli; Michael Anoka; Ruth Anoka;  
 Donald S. Anthony; Estate of Marian Anthony; Betty Apple;  
 Edward R. Apple; Nathan D. Apple, D.D.S.; Salle Appleby;  
 Joan Armstrong; John Armstrong; Miles Armstrong;  
 Sybil Armstrong, a minor; Walter O. Armstrong;  
 Edward P. Arndt, Jr.; Kathy J. Arndt; D. Jean Arnold;  
 James K. Arnold; Rodney C. Arnold; Jayne L. Aucker;  
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 Juanita Austin; John E. Austin; Estate of Judith C. Bair;  
 Ronald Bair; Nicholas G. Bakaric; Estate of Margaret Baker;  
 Richard Baker; Kay L. Balchunas; Ralph E. Balchunas;  
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 Loraine A. Balog; Joseph W. Baltozer; Kathy S. Baltozer;  
 Terry L. Bangert; Florence E. Banks; Shirley J. Banks;  
 Joann Barbush; Sistino R. Barbush, III;  
 Todd Joseph Barbush; Jacque T. Barninger;  
 John T. Barninger, a minor; Alen E. Barr; Estate of  
 Baby Barr, a minor; Kenneth Barr; Ryan Barr, a minor;  
 Sally Barr; Belle E. Barry; Estate of Burrell H. Barry;  
 Estate of Burrell Harp Barry; Ruth J. Barry;  
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 Regis Edward Beasley; Elverson Beatty; David Beaver;  
 Estate of Rita Evelyn Beaver; James Jerome Beaver;  
 Jane Beaver; Shannon Beaver, a minor; Sharon Beaver;

Alfred T. Beck; Amelia D. Beck; Debra K. Beck;  
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 Suzanne Bender; Cassa L. Bennie; Richard K. Bennie;  
 Aara Jeannette Bentz, a minor; Juanita Vilma Bentz;  
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 Nicole Botts, a minor; Doris Jean Boyer; A. Jean Boyles;  
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 Randi B. Braderman; Rosyln S. Braderman;  
 Sari A. Braderman; James T. Brannon; Theresa Brannon;  
 Diane M. Brautigan; Robert E. Brautigan;  
 Robert E. Brautigan, III, a minor; Estate of  
 Mae E. Breckenmaker; Barbara A. Brenneman;  
 Lenard A. Brenner; Rona Katzen Brenner;  
 Delores Jeanne Breski; Irene Brezitski; Christine Briggs;  
 Estate of Connie T. Briggs; Charles V. Brinser;  
 Harold W. Brinser; Helen E. Brinser; Estate of  
 Gerald A. Brockman; Jacqueline Brockman; Larry Brody;  
 Verna L. Brody; Catherine R. Brooks; Sharon R. Brooks;  
 Sonya Brooks; Betty R. Brown; Cheryl O. Brown;  
 Christine M. Brown; Claude Brown; Estate of

Elmer B. Brown; Patricia E. Brown; Thomas E. Brown;  
 Wanda Brown; Estate of Gene Brubacher; Estate of  
 Howard E. Brubacher; Peggy L. Brubacher;  
 Teresa Brubacher; Harold Bruetsch; Jean Bruetsch;  
 Karen E. Brunner; Nancy Bruno-Cohen;  
 Darla M. Brusseese; Steven A. Brusseese;  
 Michael A. Brusseese, a minor; Estate of Zola Bryan;  
 Theordore Bryan; Debra Brydon; John D. Bryner, Jr.,  
 a minor; John Bryner, Sr.; Tammy Bryner;  
 Ronald E. Buchar; Antoinette Buck; Barry Paul Buck;  
 Nathan Buck, a minor; Rebecca Buck, a minor;  
 Richard Buehler; Sharon Buehler; Mary L. Bullock;  
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 Vernon E. Burger; Charles H. Burhanan, Sr.;  
 Shirlean Burhanan; Karl Norman Burkhardt;  
 Patricia L. Burkhardt; Gerald Burkholder;  
 Patricia Burkholder; Estate of Margaret E. Busser;  
 Marshall C. Busser; Estate of Milton Butler; Ruth E. Butler;  
 Helen E. Byers; Henry W. Byers; Terry L. Byers;  
 Susan Diane Cairo; Albert W. Caka; Estate of Frank Caka;  
 Carl Campbell; Jason Allen Campbell, a minor;  
 Patricia Campbell; Shirl Campbell; Walter Campbell;  
 Carol Canoy; Debra R. Carnes; Mark P. Carnes;  
 John E. Carretti; Mary Jane Carretti; Bonnie L. Carrigan;  
 James D. Carrigan; Megan Lee Carrigan, a minor;  
 John W. Carruthers; Faye E. Carter; John T. Carter;  
 Karen Sue Carter; Ronald Richard Carter; Anna L. Caruso;  
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 Patricia A. Cassel; Robert L. Cassel, Sr.; Cliff Cerce;  
 Sandra Cerce; William D. Challenger; Estate of  
 Frank Chambers; Kathleen Chambers;  
 Samuel Chandler, Jr.; Elizabeth M. Chavey;  
 Manuel S. Chavey; Cherry Lane Motor Inc. Corp.;  
 Sarah M. China; Wallace W. China; William H. Christine;  
 Robert J. Christoff; Ellen C. Chugg; James W. Chugg;  
 Daniel Chynoweth; Kristopher Chynoweth, a minor;  
 Susan Chynoweth; Estate of Jean C. Cicak; Joseph Cicak;  
 Rudolph Cigic; Vladimir M. Cini; Debra Clark;

Jennifer Clay; Estate of Thomas E. Clipp;  
 Bernard L. Coates, Sr.; Marie C. Coates; Kimberly L. Cobb;  
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 Paul J. Cohen; Rene B. Cohen; Rose Cohen; Roslyn Cohen;  
 Samuel S. Cohen; Sheri Cohle; Estate of Beverly A. Cole;  
 William E. Cole; Peter M. Colello; Daniel A. Coleman;  
 James G. Coleman; Margaret E. Coleman; Charlene Collier;  
 Tiffany Collier, a minor; Estate of Jean H. Collins;  
 Patrick M. Collins; Anna Comfort; Estate of Lee F. Comfort;  
 Gary P. Conahan; Mary S. Conahan; Donald H. Conley;  
 Estate of John I. Conley, Sr.; Patricia E. Conley; Estate of  
 Carl Conrad; Constance M. Conrad; Rosemary Conrad;  
 Continental Inns of America (t/a Continental Inn);  
 Alexander Contract; Estate of Sylvia Contract;  
 Eveline Cooksey; Thomas P. Cooksey; Shirley M. Coombe;  
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 Leroy Corbin; Estate of Shauna Cormack;  
 Jacynthia Cormack; James Cosgrove (d/b/a Revere  
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 Catherine Marrico Costello; John Thomas Costello;  
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 Karen L. Crawford; Stephen M. Crawford;  
 Tanya M. Cronin; Estate of Floyd H. Cross, Sr.; Mary Cross;  
 Dorothy Cunningham; Jordan Benjamin Cunningham,  
 a minor; Jordan D. Cunningham;  
 Kimberly B. Cunningham; Richard M. Cunningham;  
 Carolyn Curtis; Estate of Debra Ann Curtis;  
 Christine B. Cushner; Michael R. Cushner;  
 Anthony A. Cywinski; Sharon L. Czaplewski; Estate of  
 Elizabeth R. Dacheux; Robert Dacheux; Thomas Dacheux;  
 Margery Dadamo; Olga E. Dagenhart; Emil Danko;  
 Marjorie M. Danko; Bonnie Danner;  
 Constance Kay Danner; Diane M. Danner;  
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Sherry A. Danner; Peggy J. Darby; Daniel D. Darrow;  
 Eleanor Darrow; Cathy A. Daugherty; Andrew Groff Davis,  
 a minor; Brenda K. Deaven; William E. Deaven;  
 Guy J. DePasquale; Jean DePasquale; Amy R. DeStito;  
 Daniel Salvatory DeStito, Jr.; Estate of George L. Deibert;  
 Philip Deibert; James Deibler; Karen Louise Deibler;  
 Kimberly Kay Deibler, a minor; Alice E. Deimler;  
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 Desso; Margaret Desso; Thomas Desso;  
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 Scott Alan Diven; Scott Alan Diven, Jr., a minor;  
 Delores Dix; Estate of Arthur W. Dix; Estate of  
 Ivester Dobson; Myrtle C. Dobson; Alta D. Donley;  
 Deborah L. Donley; Harold M. Donley;  
 Harold M. Donley, Jr.; Jodie M. Dorazio; Estate of  
 Harold Linn Dorman; Harold Leroy Dorman;  
 Larry A. Douglas; Pearl E. Douglas; Nellie M. Doyle;  
 Frederick Drake; Nancy Drake; Robert E. Drake, a minor;  
 Christine Marie Drapala; Holly Drapala, a minor;  
 Robert Drapala; Sandra Drapala; Edward C. Drumheller;  
 Barbara Dudek; Edward C. Dudek; Annette Dunleavy;  
 Thomas Dunleavy; Joseph R. Durbin; Ruth Ann Durbin;  
 Joseph Durborow; Karen Durborow;  
 Mary Marguerite Earhart; Curtis N. Edwards, Jr.; Estate of  
 Florence A. Edwards; Estate of Theodore E. Edwards;  
 Andrew Ehrlich, a minor; Carl Ehrlich; Margery Ehrlich;  
 Georgia Eichelberger; Gilbert Eichelberger; Carol Eicherly;  
 Frank Eicherly; Sandra L. Eisler;  
 Christine Michelle Eisner; Gerald L. Eisner;  
 Louella E. Eisner; Estate of Thomas W. Elhajj;  
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 William H. Emerick; Keith E. Enders; Estate of  
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 Doris Jeanne Erwin; Estate of Norman L. Erwin;  
 Charles Espenshade; Estate of Gladys Espenshade;  
 Lloyd Ettinger; Margaret Ettinger; Christ Evanoff, Jr.;  
 Velda B. Evanoff; Harry J. Evans; Jay W. Evans;  
 Jeannine F. Evans; Loretta M. Evans; Katerina Fabian;  
 Martina G. Falcone; Joseph N. Fantine; Linda Kay Fantine;  
 Estate of Alda J. Feeser; Lloyd T. Feeser; Estate of  
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 Millie Fernandez; Joseph J. Ferrer; Mary E. Ferrer;  
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 Marilyn Fetrow; Sandy Fettro; David J. Fields; Estate of  
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 Linda L. Fink; Michael C. Fink; Michael C. Fink, Jr.,  
 a minor; Roy M. Fishel; Susan M. Fishel;  
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 Debra M. Frey; Estate of Rikki Jo Frick;  
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 I. George Friedman; C. David Fritz; Karen Marie Fritz;  
 Linda Kay Fritz; Emma Fry; Estate of Lester Fry;  
 Dorothy Frye; Richard L. Frye; Anna M. Fulkerson;



Connie Ann Fultz; Russell E. Fultz; Estate of  
 Catherine Furjanic; Michael P. Furjanic; Lynn Furlow;  
 Betty T. Garman; Frank Garman, Jr.; Karl Garman;  
 Michael R. Garman; Albert L. Gaskin; Virginia Gaskin;  
 Dorothy Gaughan; Harold Gaughan; Joseph Gaughan,  
 a minor; Helen J. Gaw; Kenneth H. Gaw; Edward F. Gay;  
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 Barbara George; Helen S. George; Ralph W. George;  
 Wilson George; I. Ward Geraldine; Gettysburg Tours, Inc.;  
 Alfred F. Giehler; Joann C. Giehler; Rayanne E. Gifford;  
 Edward A. Gilbert; Estate of Eric Scott Gingrich;  
 JoAnn A. Gingrich; William F. Gingrich;  
 Theodore G. Giovanis, a minor; Linda Irene Glad;  
 Marco George Glad, Jr.; Kenneth D. Glaser;  
 Rosemary A.L. Glaser; Glass Kitchens of Lancaster, Inc.;  
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 Anthony Goepfert; Carole Goldstein; Deena Goldstein,  
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 I. Alan Goldstein; Nason Goldstein; Nathan Goldstein;  
 Mary M. Goles; Estate of Helen Gondek; Estate of  
 John A. Gondek; John C. Gondek; Linda Marie Gontz;  
 Melissa A. Gonzalez, a minor; Pedro T. Gonzalez;  
 Sharon R. Gonzalez; Eloise Gordon; Estate of  
 Constance D. Gordon; Wayne Gordon; Estate of  
 Leon Gottesman; Rita Gottesman; Robert Grad;  
 Barbara Grandon; Meyer A. Grant; Thelma Grant;  
 Ashby L. Graves; Charles E. Graves; Charles J.K. Graves,  
 a minor; Kelly R. Graves; Mary S. Graves;  
 David Allen Green, a minor; Donald E. Green;  
 Joseph L. Green; Monique R. Green, a minor;  
 Nancy L. Green; Romaine R. Green; Susan Ann Green;  
 Estate of Mary Jane Greenawalt; Frank Greenawalt;  
 Gary Grenoble; Charles E. Griff; Tracy A. Griffith; Estate of  
 Donna Q. Grim; James H. Grim, Sr.; Frances P. Grosky;  
 Jeffrey L. Grove; Matthew R. Grove, a minor; Ned E. Grove;  
 Ruth M. Grove; James W. Grumley, Jr.; Estate of  
 Robert M. Grunden; Mildred A. Grunden; Daniel Ray Guhl;  
 Estate of Elmer R. Guhl; Estate of Gladys Guistwhite;  
 Lloyd Guistwhite; John W. Gumby, Sr.; Estate of

Charles L. Gummo; Elizabeth A. Gustin; Estate of  
 Rudolph R. Gustin; Anna Guyer; Estate of Carl A. Guyer;  
 Stella D. Guyer; Deborah A. Hacker; Diana L. Hahn;  
 Norman L. Hahn; James S. Haines; Sylvia Haines;  
 Estate of Dorothy L. Halbleib; Walter Halbleib; Estate of  
 Alfred T. Hall, Jr.; Gary A. Hall; Margaret R. Hallock;  
 Wanda Halterman; Earl Hammaker;  
 Eleanor Kay Hammaker; Irene Elizabeth Hammaker;  
 Estate of Grace Dorothy Hammer; Ann Louise Hammond;  
 James Woodrow Hammond; Estate of Helen M. Hank;  
 Harold C. Hank; Eunice A. Hansard; Roy E. Hansard;  
 Denise Hanson; Robert Hanson; Donald E. Harper;  
 Sandra Harper; Alvin Harrell; Anna Harrell;  
 Thomas R. Harris; Estate of Donald Haskins;  
 Gloria Haskins; Betty Hatter; Harold Baucum Hawck;  
 Cheryl Hawkins; Marilyn S. Hayes; Scott P. Hayes, a minor;  
 Virginia L. Hayes; Warren William Hayes;  
 Albert L. Heckman, Jr.; Ryan Lloyd Heckman, a minor;  
 Fred M. Hedding; Lillian M. Hedding; Bertha Heisey;  
 Estate of Emma M. Helman; Paul C. Helman;  
 Earl Lamar Helwig; Violet Mae Helwig;  
 A. Shelly Hennessy; Mark Casey Hennessy;  
 Heritage Inns, Inc.; George J. Hernjak; Mary Jane Hernjak;  
 Patria A. Herrold; Scott E. Herrold; Edward John Hertzog;  
 Marie H. Hertzog; Estate of Charles J. Hess, Sr.;  
 Kathryn Hess; Gary H. Heuer; Gary H. Heuer, Jr., a minor;  
 Judith M. Heuer; Kenneth B. Hickernell;  
 Pearl M. Hickernell; Charlaine Hickman; Estate of  
 Frank D. Hickmon; Ruth N. Hileman; Betty Hill; Estate of  
 Edward T. Hill; Estate of Kern Hill; Evelyn Hill;  
 Lee N. Hill; June A. Hill; Daniel R. Hilt; Estate of  
 Ethelda V. Hilt; Diane Hindermyer; Estate of  
 Thomas E. Hines, Sr.; Leverta M. Hines; Estate of  
 George V. Hitz; Marjorie B. Hitz; Debbie Ann Hobaugh;  
 Matthew Kyle Hobaugh, a minor; Robert Elwood Hobaugh;  
 Caryl C. Hoch; Louis A. Hoch; Estate of Carl Hocker;  
 John D. Hocker; Nancy Hocker; Arlene M. Hoffman;  
 James F. Hoffman; Phillip W. Hoffman;  
 Estate of Marilyn L. Hoffmaster; S. Robert Hoffmaster;

Estate of Franklin C. Hoffmeier; Estate of  
 Martha Hoffmeier; Thomas E. Hoffmeier; Estate of  
 Robert P. Holmes; Annie A. Holowka; Marie J. Holowka;  
 Estate of Harry S. Hommel; Estate of Clyde D. Hoover, Jr.;  
 Henry H. Hoover; Margaret E. Hoover;  
 Host Enterprises, Inc.; Howard G. Houck, Jr.;  
 Martha E. Houck; Gertrude Houser; Herbert H. Houser;  
 Kathleen M. Houser; Robert A. Houser, Jr.;  
 Terry Lee Huffman, Sr.; AnnMarie Huggins;  
 James R. Huggins; Frank S. Hughes, Sr.;  
 L. Catherine Hughes; Estate of Frank C. Hummert, Sr.;  
 Arthur L. Hunt; Sylvia L. Hunt; David W. Hunter;  
 Madeline J. Hunter; Jodi Huntzinger, a minor;  
 Josephine Huntzinger; Larry Huntzinger;  
 Robert Huntzinger; Sharon Huntzinger; Dorothy E. Husic;  
 Joseph Husic; Glenna Hyde; William R. Hyde; Estate of  
 Clarence L. Intrieri; Pearl M. Intrieri; Helen Isaac;  
 Edward P. Jackson; Estate of Virginia Jackson;  
 Larry Jackson, a minor; Larry Jackson, Sr.; Amos James;  
 Estate of Kameelah A. James; Estate of  
 Richard Robert James; Linda J. James; Richard W. James;  
 Gregory A. Jarrett; Katherine J. Jarrett; Carol F. Jensen;  
 Estate of Edward Jensen; Nancy E. Jeszenka;  
 Claudette Johnson; Estate of Arthur Johnson;  
 Hilda C. Johnson; John M. Johnson; Karen E. Johnson;  
 Raela Johnson; Scott Farrell Johnson, a minor; Estate of  
 James F. Johnston; Joan B. Johnston; Elaine Jones;  
 Estate of Clarence L. Jones; James R. Jones; Mae I. Jones;  
 Wallace M. Jones; Richard J. Jordan; Jacqueline L. Jumper;  
 Robert E. Jumper; Edith Kabakow; Jeanne H. Kalina;  
 Joseph Edward Kalina; Wilhelmena Kamarar;  
 Richard L. Kamarar; Shelby Kamarar;  
 Jacqueline Kaminsky; Rujiporn Kanthatham, a minor;  
 Helen Katzen; Estate of Dale R. Kaylor; Robert T. Kaylor;  
 Ruth E. Kaylor; Patricia Keammerer; Richard Keammerer;  
 Sara C. Keammerer, a minor; Harold J. Keating;  
 Paula J. Keating; Anna M. Keefer; Roy M. Keefer;  
 Dennis A. Keen; Suzanne L. Keen; Grace Kepp;  
 Richard Kepp; Howard P. Kerns; Nancy A. Kerns;

Carol R. Kershner; Ronald Kershner; Ronald C. Kershner;  
 Ruth B. Kesselring; Thomas L. Kesselring; Estate of  
 Deloris Kessler; Henry Kessler; Charles C. Kichman;  
 Joan A. Kichman; Kandice M. Kichman;  
 Matthew C. Kichman; Estate of Daniel C. Kiely;  
 Loretta J. Kiely; James P. Kiernan, Jr.; Louise M. Kiernan;  
 Linda Lou Kilmore; Debra A. Kimmel; Jeffrey T. Kimmel,  
 a minor; Josef H. Kimmel, a minor; Joseph H. Kimmel;  
 Michelle M. Kimmel; Larry J. King, a minor;  
 Dale B. Kinsey; Estate of Dorothy A. Kinsey; Estate of  
 Frank M. Kiren; Margaret L. Kiren; Alan Kireta;  
 Dale E. Kirkwood; Estate of Daniel Kirkwood;  
 JoAnn M. Kirkwood; Diane E. Kirsch; Francis L. Kirsch;  
 Lisa Kislov; Estate of Derek John Kitner; Vicki C. Kitner;  
 Estate of Raymond Kleiman; Leah Kleiman; Joel Klein;  
 Joshua Klein, a minor; Marilyn Klein; Selma Ruth Klein;  
 Charlaine H. Kline; Jill K. Kline; Martha J. Kline;  
 Robert A. Kline; Robert A. Kline, Jr.; David Klinetob;  
 Estate of Ruth E. Klinetob; Richard Alan Klingel;  
 Steven R. Klinger; Lydia Ann Knight; Estate of  
 Josephine Knoll; Joseph Knoll; Estate of Mary Louise Kohr;  
 Carol B. Kolarac; Abigayle Amanda Koller, a minor;  
 JoAnn Koller; Terry L. Koller; Doreene Koons; Estate of  
 Louis A. Koons; Florence S. Koons; Lyle M. Koons, Jr.;  
 Mark C. Koons, a minor; Ira E. Koser, Sr.; Ruth F. Koser;  
 Drusilla L. Kosiba; Peter Kosiba, Jr.; Barbara A. Kosko;  
 Robert G. Kosko; Lisa Koslov; Steven Koslov; Estate of  
 James J. Kostelec; Linda J. Kostelec;  
 Caleb Cain Kostenbauder, a minor; Julie A. Kostenbauder;  
 Lamar S. Kostenbauder; Cynthia J. Kott; Estate of  
 Amy Marsh Kott; Kenneth H. Kott; Margaret Krafft;  
 George M. Krasevic; Louise Krasevic; Chester Kreiser;  
 Mae L. Kreiser; Martin L. Kreiser; Sandra Jean Kreiser;  
 Sheila Marie Kreiser, a minor; Joan R. Krell;  
 Staci Renee Krell, a minor; Estate of Betty Kriner;  
 Fred Krom, Jr.; Terry L. Krom; Stephen Krone;  
 Denise E. Kuhn; Emory L. Kuhn; Estate of Felix Kulbacki;  
 Patsy Kulbacki; Barbara A. Kuzma; Richard E. Kuzma;  
 Estate of Antonia C. LaBoy; Martin Cadiz LaBoy; Estate of

Matthew Lacey; Scott S. Lacey; Sandra L. LaMarca;  
 Estate of Claire W. Lamade; John Lamade;  
 Lewis M. LaMarca; Charles W. Lamason;  
 Darlene D. Lamason; Fay I. Lambert; Lisa G. Landis;  
 Timothy C. Landis; Keith Lanser; Marilyn Jean Lanser;  
 Estate of John Y. Lantz; Mary Lantz; Nancee E. Laster;  
 Jennifer H. Laubach; Janice Elaine Laudermilch;  
 Robert L. Laudermilch; Gale L. Laughman;  
 Glenn E. Laughman; Gregg A. Laughman;  
 Jane E. Laughman; Jennifer H. Laughman;  
 Nellie E. Laughman; Quay L. Laughman;  
 Dorothy C. Lawrence; Frank H. Lawrence;  
 Delma Eugene Layne; Estate of Florence S. Layne;  
 Hiram Leader; Dennis Lebo; Janice A. Lebo;  
 Annette E. Lee; Estate of Alice Elizabeth Lee; James Lee;  
 Jane T. Lee; Shirianne I. Lee; Rosemary Leggore; Estate of  
 Harold Lehmer; Jean Lehmer; David Lehrman; Estate of  
 Cory S. Lehrman; Lynn S. Lehrman; Ryan Lehrman;  
 Estate of Wanda M. Leiter; Jack A. Leiter; June L. Lengjel;  
 Catherine S. Lenyo; Estate of Daniel Lenyo;  
 Barry A. Leonard; Carrie R. Leonard; Isolina Leoni;  
 Sparto Leo Leoni; Estate of Ida Levine; Reuben Levine;  
 Estate of Ozzie L. Lewis; Dorothy S. Liddick;  
 Helen J. Liddick; Christopher Lighty, a minor;  
 Irvin D. Lighty; Ruth Denise Lighty; Tracey Lighty,  
 a minor; William Lighty, a minor; Lincoln Heritage, Inc.;  
 Carole M. Lindenberger; Estate of Paul N. Lindenberger;  
 Florence R. Lingle; George Linsey; Cathy Linta; Estate of  
 Joseph Lipiec; Ruth Lipiec; Benjamin Lipsky;  
 Pearl P. Lipsky; Betsy L. Little; J. Michael Little;  
 Naomi S. Livingston; William H. Livingston;  
 Jayne C. Lloyd; Llewellyn Lloyd; Delores Lomman;  
 Paul Lomman; Carolyn D. Lorenzo; Estate of baby Lorenzo;  
 Nicholas Lorenzo; Estate of Elder A. Love;  
 Madeline T. Love; Margaret E. Love; Merrill E. Lower, Jr.;  
 Alex Lowy; Estate of Henrietta Lowy; Nalda Ludwig;  
 James Edward Lutz; Michele L. Lutz; Barbara J. Lyons;  
 Estate of Delbert Lyons; Jeffrey D. Lyons; Ruth Lyons;  
 Harry Joseph Machita; Susanne Machita; Cecelia Macri;  
 Margaret L. Madden; William R. Madden;

Tammy K. Madonna; Beverly Magdule; Stuart Magdule;  
 Barbara Magill; Diana R. Maglin; Edward R. Maglin;  
 Doris J. Mahady; Estate of Daniel A. Mahady;  
 Mickey D. Mahone, Sr.; Estate of Frank Manfred, Jr.;  
 Ethel Manfred; Jane Elizabeth Manning;  
 Neal Wilson Manning, Jr.; Margaret R. Mans;  
 Walter R. Mans; Charles Mansberger;  
 Pauline R. Mansberger; Betty J. Marinaro;  
 Frank F. Marinaro; Stephen A. Marinello;  
 Kimberly D. Markey; Robin Markey; Dorothy Marks;  
 Harold Marks; Debra Foglesanger Martin;  
 Gregg Eugene Martin; Leanna Martin;  
 Noah N. Martin Company; Dora Martini; Arvin Maskin;  
 Marie Massare; Barbara Mae Massie; James Robert Massie;  
 Martha B. Mastriania; Fabiola T. Matalonis;  
 Robert L. Matalonis; Dorothy M. Mathers; Estate of  
 Raymond Mathers; John Matriccino; Linda Lou Matriccino;  
 Nancy Maurer; Jill Maus; Rodney Dennis Maus;  
 Todd Dennis Maus, a minor; Charles J. Maxwell;  
 Lois Maxwell; Estate of Edith Mazurik; Joseph Mazurik;  
 Michael Mazzaccaro; Mamie McArthur;  
 Kenneth C. McCann, Jr.; M. Colleen McCann;  
 Helen McCartney; Robert C. McCartney;  
 Doris N. McCreary; Lester E. McCreary;  
 Douglas A. McDade; Marlene McDade;  
 Donna Lee McDermott; Harriet Lynn McDermott;  
 Larry Lee McDermott; James R. McEachern;  
 Kathleen C. McEachern; Dorothy McElwain;  
 Earl McElwain; Kathryn J. McFann; Carl McHugh;  
 Carol McHugh; Maxilee McInnis; Estate of  
 Arvilla C. McKee; William G. McKee; Dorothy McMurray;  
 Jill Benfer McPherson; Randolph McPherson; Estate of  
 Thomas McVey; Nancy McVey; Charles Fillmore Mebus, II;  
 Arthur R. Medeiros; Mary Jane Medeiros;  
 Ginie Lee Medillin; Ramona Medillin, a minor;  
 Alton J. Meminger; Barbara J. Meminger;  
 Patricia D. Mendenhall; William H. Meredith; Estate of  
 Daniel Mescall; Andrew B. Meyers, a minor;  
 Ellyn M. Meyers; Harry Meyers; Jonathan B. Meyers,



a minor; Andrew M. Mickola; Rita M. Mickola; Estate of  
 Stella E. Midas; King F. Midas; John J. Milkovich;  
 Thelma D. Milkovich; Cecelia Parsons Miller;  
 Christopher Layne Miller; Cynthia Miller; Delores J. Miller;  
 Dr. Herbert Miller; Earl E. Miller; Ellen M. Miller;  
 Erin Kathleen Miller; Estate of Henry Lionel Miller;  
 Estate of Irvin S. Miller; Estate of Irvin S. Miller, II;  
 Estate of Paul L. Miller; Estate of Paul R. Miller; Estate of  
 Violet W. Miller; Estate of William S. Miller;  
 Gayle O. Miller; Ivan M. Miller; Mary E. Miller;  
 Mary L. Miller; Mildred Miller; Myrtle Miller;  
 Preston H. Miller; Ronald E. Miller; Rosemarie Miller;  
 Thomas B. Miller; Timothy Miller; Violet E. Miller;  
 Rosemary Milspaw; Harry Minnich; Marion F. Minnich;  
 Estate of Ida Minns; William E. Minns; James H. Mitchell;  
 Estate of Gisella Mohar; Edward G. Montgomery;  
 Jacqueline Ann Montgomery; Daniel Allen Montville,  
 a minor; Harry Montville; Virginia Montville; Estate of  
 Ernest Morrison; Dale W. Morrow; Elizabeth Mosby;  
 James Mosby; Joan A. Moss; Marvin D. Moss;  
 Eleanor Mosteller; Estate of Karl E. Mosteller;  
 Barry R. Mroccka; Mary Beth Mroccka; Leonard Mudry;  
 Maureen Mudry; Timothy Mudry, a minor;  
 Barbara J. Mulholland; James J. Mulholland; Estate of  
 Betty A. Mumma; Kenneth E. Mumma; Lelani Mumma;  
 John Mummert; Joyce M. Mummert; Nancy L. Mummert;  
 Corrina Smith Munar; Estate of Anthony L. Murlin;  
 Myrtle E. Murlin; James J. Murphy; Jeremy M. Murphy,  
 a minor; Jesse G. Murphy, a minor; Sherry Dawn Murphy;  
 Beverly A. Murray; Estate of V. Marlene Murray;  
 Gilbert F. Murray; John Ernest Murray, Sr.;  
 Jeune M. Murren; Joseph Murren; Charles E. Musser;  
 Janet I. Musser; Audrey W. Muth; Raymond F. Muth, Jr.;  
 Estate of Alvin L. Myers; Thelma May Nagy;  
 Robert F. Napiltonia; Sheila Napiltonia;  
 Samuel Michael Naples, a minor; Joseph M. Naples;  
 Mary L. Naples; Pamela F. Naples; Pamela F. Naples;  
 Catherine Neidert; Estate of Henry Neidert, Jr.;  
 Richard Neidinger; James Boyd Nesbit; Sheila Nesbit;

Nick Nicholas; Sophie Nicholas; Kim B. Nichols;  
 Donna Marie Nissley; Estate of Timothy M. Nissley;  
 Daniel E. Nordfors, a minor; Patricia A. Nordfors;  
 William E. Nordfors; Charles D. O'Brien; Helen D. O'Brien;  
 Jennifer C. O'Brien, a minor; John F. O'Hara;  
 Lois J. O'Hara; Lawrence T. O'Neill; Mary Kay O'Neill;  
 Donna Obercash; Estate of Barry Obercash;  
 Paula C. Obercash, a minor; Carl E. Oross; Sandra J. Oross;  
 Marian Romaine Ort; Estate of Bernard Ostroski;  
 Theresa C. Ostroski; Frances Ouellette; Ralph Ouellette;  
 Ronald J. Ouellette; Overview Limited Partnership;  
 David E. Pace; Estate of Emily A. Paczkowski;  
 Eva O. Palmeri; Gui S. Palmeri; Estate of Boyd Pannebaker;  
 Kathryn Pannebaker; Jerry L. Parker; Sara Parker;  
 Barbara Ann Parrish; James G. Parrish; Janice A. Parson;  
 Christine I. Patrick; John D. Patrick; Catherine D. Patton;  
 Robert M. Patton; Keith A. Paup; Susan A. Paup;  
 Dorothy J. Pavlick; Rudolph R. Pavlick;  
 Stanley R. Pearson, Jr.; David Q. Pechart;  
 Diane K. Pechart; Stephen C. Pechart, a minor;  
 Lois J. Peffley; Wayne D. Peffley; Betty J. Peifer;  
 Carol Peifer; Douglas Piefer; Marlin J. Peifer;  
 Lavetta D. Penn;  
 Pentidatillo Corp. (d/b/a Italian Villa East); Anna Peters;  
 Darla Peters; Estate of George Peters; Esther Peters;  
 William Peters; Glenn Peterson; Jolene Peterson;  
 Dennis D. Petrina; Nancy Petrina; Mildred Petrovich;  
 Estate of Helen Petrucci; Estate of John P. Petrucci, Sr.;  
 John P. Petrucci, Jr.; Barbara Ann Pettey; Estate of  
 Edward Bruce Pettey; Anna V. Phillips; Betty Snow Phillips;  
 John W. Phillips; Lawrence B. Phillips; Leonard F. Picciotti;  
 Brenda Pickett; Maria I. Pierce; Estate of Michael F. Pinko,  
 Sr.; Marlene L. Pinko; Kenneth A. Pipher, Sr.;  
 Anna T. Placey; Estate of Anthony S. Placey;  
 Christine L. Plank; Samuel E. Plank; Karen A. Plappert;  
 Michael L. Plappert, a minor; William F. Plappert;  
 Leonor Platkin; Mildred B. Plattner; Samuel E. Plattner;  
 George Pleasant; Elizabeth R. Pluta; John David Pluta,  
 a minor; Estate of Yvonne W. Poe; Louis R. Poe;



Robert H. Polsky; Beulah N. Popp; Sylvia J. Posey;  
 Daniel Potteiger; William L. Potts, Jr.; Lamar F. Powell;  
 Marjorie J. Powell; Richard Power; Estate of  
 Robert A. Pratt; Estate of Janelle Price; Jan Price;  
 Jesse A. Price, Jr.; Patricia L. Prin; William A. Prin;  
 Angela M. Prince; Sarah Jo D'Oro Prince, a minor;  
 Georgann Pristello; Jaime Lynn Pristello, a minor;  
 James J. Pristello; Maurice P. Procopio; Fannie Mae Proctor;  
 Lawrence H. Proctor; Myron Pronko; Estate of  
 William Prosperi; Joan Prosperi; Herman H. Prosser;  
 Estate of Charles C. Pugliese; Lisa D. Pugliese;  
 Frances G. Purcell; John Purcell; Kenneth Putt; Ruth Putt;  
 Laura E. Quante; Robert D. Quante; Estate of  
 Edythe M. Quenzer; Richard C. Quenzer;  
 Erin Lee Quigley, a minor; Lawrence D. Quigley;  
 Mary M. Quigley; Phyllis J. Quigley; Timothy L. Quigley;  
 Cornelius E. Quinn; Sheila M. Quinn; Estate of  
 Helen Rachelson; Norman Rachelson; Delores Anne Rad;  
 Thomas Rad; Donna Marie Radabaugh;  
 George William Radabaugh; Estate of Anthony John Rados;  
 Matthew Ronald Rados, a minor; Robert A. Rados;  
 Ronald R. Rados; Susanne C. Rados; Marlene Rafaj;  
 Jennifer A. Rafy, a minor; Robert W. Rafy; Sandra K. Rafy;  
 Helen M. Railing; Earl M. Ramage; Joan M. Ramage;  
 David E. Rambler; Karen E. Rambler; Rosemary Ramos;  
 Michael P. Raynock; Estate of Mary L. Razzis;  
 Herman A. Razzis; Dorothy Reamer; Estate of  
 Walter H. Reamer; Albert Reap; Eleanor Reap;  
 Janet Redfern; Blossom B. Reed; Estate of Edward G. Reed;  
 Margaret Reed; Samuel L. Reese; Sandra Y. Reese;  
 Yvonne Reeser; Berneice Reigle; Estate of  
 Kenneth Aaron Reigle; Florence E. Remsnyder;  
 Orin F. Remsnyder; Gina Renshaw; Jane Renshaw;  
 W. Richard Renshaw; Hyman Resnick; Ida Resnick;  
 Joyce Resnick; Marvin E. Resnick; John Edward Rettinger;  
 Miriam P. Rettinger; Estate of Charles H. Reynolds;  
 Mary Catherine Reynolds; Thomas E. Reynolds;  
 Kathlene Ann Rhoads; Ronald Eugene Rhoads;  
 Dennis R. Richie; Kathleen L. Richie;

Sharon L. Rickabaugh; Donna Ricker; Roy Ricker;  
 Raymond Rider; Florence C. Riordan;  
 William Joseph Riordan; Todd Anthony Risser, a minor;  
 Carl F. Ritchey; Elizabeth F. Ritchey; Lynn Ritchey;  
 Edward E. Ritter, Jr.; Sonda Ritter; Jane M. Roberts;  
 Estate of Lillian L. Robinson; Estate of Wilbur F. Robinson;  
 Izola B. Robinson; Jeanne N. Robinson;  
 Louise A. Robinson; John B. Roche III;  
 Nancy Elaine Roche; Harriet Rochman;  
 Herbert B. Rochman; Dolores M. Rockey; Estate of  
 David D. Rockmore; Mary E. Rockmore; Estate of  
 Agnes M. Rogers; Paul P. Rogers; Elizabeth L. Rolko;  
 George P. Rolko; Gerald R. Romberger;  
 Amanda C. Rorapaugh, a minor; Dale Rorapaugh;  
 Daniela Rorapaugh; Edith Z. Rose; Estate of  
 Bernard Z. Rose; Estate of Leonard L. Roseman;  
 Ruth Roseman; Coral Rosen; Estate of Zellman Rosen;  
 Jack Ira Rosen; Ralph Rosen; Robert Samuel Rosen;  
 Doris E. Rosi; Joseph August Rosi; Virginia Ross; Estate of  
 Edward H. Roth, Jr.; John Roth; Linda Roth;  
 Sarah M. Roth; Estate of Rose Rothberg; Mary A. Rounsley;  
 Millard E. Rounsley; Estate of Evelyne Nicole Rowe;  
 Evelyne Rowe; Fetus Rowe; Randall Rowe; Beth Rozman,  
 a minor; Frank Rozman; Lugenia Rozman; Lewis Rubin;  
 Nancy Rubin; Elizabeth R. Rudy; Estate of Isaac C. Rudy;  
 Susan L. Rudy; Richard M. Rutt (d/b/a Rutt's Tours);  
 Debra Rutter; Gregory Dane Rutter; Alda R. Ryan;  
 Donald B. Ryan; Joyce M. Rymer; Juergen Rymer;  
 Mary Margaret Safranek; Emily Beth Sajeski, a minor;  
 Eugene A. Sajeski; Nancy C. Sajeski; Hugo Salazar;  
 Kenneth L. Salov; Nancy J. Salov; Estate of  
 Stephanie A D Sanden; Jeffrey Allan Sanden; John Santoro;  
 Melissa Susan Santoro, a minor; Susan Santoro;  
 Subhash Sarda; Randolph Saunders; Sharon Saunders;  
 Carol A. Saytar; Steve W. Saytar; Salvator Scali;  
 Ruth Schaffhauser; Barbara A. Schaffner;  
 Robert L. Schaffner; Dervis Scheib; Nancy L. Scheib;  
 James E. Schell; Kimberly Ann Schell; Marilyn E. Schell;  
 Kriste S. Schoppert; Wendy Schotzberger;

Barry L. Schrade; Joyce M. Schrade; Terry L. Schrade,  
 a minor; Estate of Harold G. Schroll; Helen Schroll;  
 Beth Ann Schuchman; Harry L. Schwartz;  
 Jan M. Schwartz; Patricia H. Schwartz; Deobrah Sczypta;  
 Ronald L. Sczypta, a minor; Dale P. Searer;  
 Susan M. Searer; Angela Sedeshe; Eva A. Seigh;  
 Kenneth Seigh; Sylvia Selkirk; William E. Selkirk; Estate of  
 Frances J. Sennett; Lester D. Sennett; Arthur Philip Shade;  
 Estate of Mary Anna Shade; Harold L. Shaeffer;  
 Nancy E. Shaeffer; Catherine J. Shaffer; Darrel Shaffer;  
 Estate of Allan L. Shaffer; Estate of Donna L. Shaffer;  
 Frances May Shaffer; Gerald A. Shaffer; Janet L. Shaffer;  
 Joseph A. Shaffer; Michael Shaffer; Richard P. Shaffer;  
 Thelma Shaffer; Estate of Arlene Shanaman;  
 Paul Shanaman; Eugene Shaner; Ida Shaner;  
 Lawrence W. Shank; Nancy L. Shannon; Albert Shapiro;  
 Estate of Milton Shapiro; Gayle D. Shapiro;  
 Marcia P. Shapiro; Doris Sharar; James Sharar;  
 Linda Share; Carol A. Sheaffer; John G. Sheaffer;  
 Roxanne Sheaffer; Mary Ann Sheetz;  
 Michael Richard Sheetz; Debra W. Shepler;  
 Jody Lee Shepp; Sarah Sherman; Sidney Sherman;  
 Lee Shields; Estate of Charles J. Shipe; Raymond C. Shirk;  
 Sue Ann Shirk; Estate of E. Maxine Shriver;  
 Cecilia Shuller; Diana Shuller; Estate of Harry B. Shuller;  
 Elaine L. Shultz; Harold M. Shultz; Estate of  
 Evelyn Shumaker; Estate of Raymond W. Shumaker;  
 Estate of Ella J. Simmons; Whitney Simmons, a minor;  
 Richard P. Simonton; Theresa Simonton; Donna Sine;  
 Welbie Sine; David Singer; Diane F. Singer; Edwin Singer;  
 Rena Singer; Carla F. Sipe; Stephen J. Sipe; Evelyn Siple;  
 Howard C. Sipling; Crystal Sites; Joseph Skasko;  
 Skiadas Brothers Enterprises, Inc.; Ronald H. Skubecz;  
 James M. Slee; Jeromy F. Slee, a minor; Eileen Slessor;  
 Cheryl L. Smerick; SMG Investments; Jeffrey Allen Smith;  
 Joan L. Smith; Catherine Smith; Christin Lynn Smith,  
 a minor; Deborah A. Smith; Estate of Charles R. Smith, Jr.;  
 Estate of Donald Leroy Smith; Gloria A. Smith;  
 Jennifer Marie Smith, a minor;

L.E. Smith Wholesale Distributors; Lydia Smith;  
 Mary Ellen Smith; Matthew John Smith, a minor;  
 Michelle Smith; Raymond B. Smith; Richard Lee Smith;  
 Robert Smith; Robert K. Smith; Robert M. Smith;  
 Ross D. Smith; Sharon A. Smith; Shawn Smith, a minor;  
 Shawnee Dee Smith; Shirley Smith; Steven Lee Smith,  
 a minor; Terry F. Smith; Reverend Wayne L. Smith;  
 William Robert Smith, a minor; Odis D. Sneed;  
 Peggy J. Sneed; S.N.G. Investments, Inc.; Harry W. Snow;  
 Donald E. Snyder; Esther Snyder; James E. Snyder;  
 Kenneth R. Snyder; Patricia A. Snyder;  
 Ricky L. Snyder, Sr.; Sandra L. Snyder; Estate of  
 Helen J. Sohn; Ruby B. Sollenberger; Betty S. Solomon;  
 Edward Solomon; Estate of Ruth A. Sommerville;  
 George H. Sommerville; Sharon Sonni; Thomas Sonni;  
 Marie A. Sotack; Thomas R. Sotack; Daniel Soto;  
 Roberto Soto; Eugene L. Southard; Patricia Southard;  
 John P. Soutner, Jr.; Kelly B. Soutner; Mary Spanitz;  
 Michael Spanitz; Gail E. Speese; Grace Spencer;  
 Robert H. Spencer; Charles W. Spiroff; David Von Spiroff;  
 Estate of JoAnn Spiroff; Natalie Spiroff;  
 Margaret S. Spoljaric; William J. Spoljaric; Jacob N. Spong;  
 Patty A. Spong; Barbara Spotts; Harry H. Spotts;  
 Fred J. Sprowls; Raymond Winston Sprowls;  
 Thomas O. Sprucebank; Goldie L. Staab; Pia Stadiem;  
 Joyce E. Stare; Edmond Francis Frick Starr; James Starr;  
 Robin Kaye Starr; Jo Ann Staub; Rachael L. Stauffer;  
 Rachel Stauffer; Robert A. Stauffer; Victoria A. Stauffer;  
 Betty Y. Steinruck; Estate of Carl L. Steltzer; Mary Steltzer;  
 Estate of Clair Stephenson; Florence E. Stephenson;  
 Tammy M. Stephenson, a minor; Cheryl Claire Sterner;  
 David Anthony Sterner; C. Evelyn Stewart;  
 Charlotte Stewart; Estate of Joseph Stewart; Alberta Stoak;  
 Diane Stoddart; Matthew A. Stofanak; Lee M. Stofanek;  
 Barbara A. Stone; J. Michael Stone; M. David Stone,  
 a minor; Robert C. Stone, III; Wesley Stonesifer, a minor;  
 William Stoufer; Magdalena Stout; Richard Stout, a minor;  
 E. Gladys Strange; Robert W. Strange;  
 Thomas E. Strauss, Inc.; Mary Jane Stretch;

James K. String; Estate of Dorothy L. Stroh;   
 Marlin E. Stroh; Carey Stroman, a minor; Debra Stroman;   
 Lowell Stroman; Lyle Stroman; Dennis L. Stuart;   
 Jennifer K. Stuart; Clarence L. Stuck; Irene R. Stuck;   
 John W. Stump; Margaret E. Stump; Beryl Ann Sullivan;   
 Estate of Jeffrey E. Sullivan; Estate of William Sullivan;   
 John William Sullivan; Kevin Sullivan, a minor;   
 June C. Sunday; Michael D. Sunday; Jacob Louis Susskind;   
 Clifford J. Sutton; Ruth E. Sutton; Erek Swanson, a minor;   
 Janelle W. Swanson; Kara Swanson, a minor;   
 Steven W. Swanson; Estate of Stephen G. Szabo;   
 Phyllis Szabo; Helen Szollosy; Louis Szollosy;   
 Donald Leroy Tadych; Judy Faye Tadych; Barbara Taylor;   
 Gail C. Taylor; James Taylor; John O. Taylor; Lisa C. Taylor;   
 Marian E. Taylor; Richard E. Taylor; Kermit E. Thames;   
 Martha Ann Thames; Ruby N. Thames; Estate of   
 Linda Sue Thomas; Estate of Norman A. Thomas;   
 James E. Thomas; Janet M. Thomas; Mary E. Thomas;   
 Michael James Thomas; Cora M. Thompson;   
 Frank Thompson, a minor; Fred E. Thompson;   
 Inman Thompson; Leah Thompson; Lisa Thompson;   
 Mary E. Thompson; Elwyn E. Tilden;   
 Mary Margaret Tilden; Estate of Arthur Tilly;   
 Gertrude Tilly; Phillip G. Tomko; Sterling E. Toomey;   
 Gladys E. Topper; Theresa Torau; Alice Polly Torchia;   
 David E. Towsen; Lori K. Towsen; Dorothy M. Triest;   
 Corbin S. Trimmer, a minor; Jean Trimmer;   
 Ronetta J. Trimmer; Steven R. Trimmer; Estate of   
 Elaine H. Troland; Sophia Troutman; Estate of   
 Jared T. Troxell; Sandra Louise Troxell; Thomas Troxell;   
 Brenda D. Updegraff; Glenn D. Updegraff, Jr.;   
 Lucy Updegraff; Gerald J. Urban; James T. Urban;   
 Anthony Vasco, Jr.; Dorothy G. Vasco; Estate of   
 Caroline Vasco; John Vasco; Donna Vasquez;   
 Gabriel Vasquez; Gabriel Vasquez, a minor;   
 Margaret E. Vaughn; Estate of Frank L. Verbos;   
 Rosemary Elizabeth Verbos; Gary Villella; Estate of   
 Clayton R. Vogel; Frances F. Vogel; Angeline M. Vulich;   
 Joseph S. Vulich, Carol Wagner; Charles Edward Wagner,   
 a minor; Charles W. Wagner; Jack E. Wagner;

Beverly E. Walker; Lori Thompson Walker;  
 Rosa Lee Walker; William M. Walker;  
 Camille Donna Walters; Lester H. Walters; Lois Walters;  
 Richard Arnold Walters; Ronald A. Ward; Ronald A. Ward,  
 a minor; Estate of Mamie Lou Warren; Peter Washinko;  
 Aubrey L. Watkins; Darryl Watkins, a minor;  
 Dierdra Watkins, a minor; Sandra L. Watkins;  
 Leila Mae Watson; Milton Watson; Eleanor B. Webb;  
 Estate of Lewis E. Webb; Theodore B. Webb;  
 Diane T. Weber; William J. Weber; Carol L. Weirich;  
 Leonard J. Weishner, Jr.; Estate of Walter A. Weit;  
 Virginia Irene Weit; Estate of Amy Sarah Weller;  
 Marian Weller; Robert Weller; Catherine M. Wendolowski;  
 Paul Wendolowski; Paul Wendolowski, a minor;  
 Gilbert D. Werner; Shirley M. Werner; Halfred W. Wertz;  
 Karen Ann Wertz; Ruth P. Wertz; Daniel Wevodau;  
 Estate of Linda Wevodau; Charlene G. White;  
 Dennis White; Donna White; John P. White, Jr.;  
 Justin Edward White, a minor; Shawn Patrick White;  
 Estate of Clarence Whitebread; Magdalene N. Whitebread;  
 James O. Whittaker; Sandra Whittaker;  
 Eleanor S. Wililams; Barbara Wilkerson;  
 Andrew F. Williams; Archie L. Williams;  
 Arthur Ray Williams, Jr.; Audrey Mae Williams, a minor;  
 Barbara Williams; Curtis Williams; Eileen Williams;  
 Frances L. Williams; Guy Ronald Williams;  
 Harry E. Williams, Jr.; Harry J. Williams, III, a Minor;  
 Judy E. Williams; Nancy Williams; Sheryl L. Williams;  
 Walter T. Williams; Leslie S. Williams; Barbara Wilson;  
 Clarence L. Wilson; Donna J. Wilson; Estate of  
 Janet Wilson; Sandra Lee Wilson; Gloria Ann Wingert;  
 Thomas R. Wingert, Sr.; Eleanor W. Wise; Estate of  
 Frank E. Wise; Kathleen J. Wise; Rosalyn A. Wise;  
 Theda A. A. Wise; Estate of Irene E. Wisegarver;  
 Richard Wisegarver; Carol Wish; Joel Wish;  
 Helen Wisniewski; Estate of Stanley J. Wisniewski;  
 Donna Jean Witeof; Frank Witeof; Audrey Wolf; Estate of  
 John Wolf; Esta Wolfe; Lawrence Wolfe; Donna Wood;  
 Gary Wood; Mildred Woolf; Irwin P. Woolfson;



Patricia Woolfson; Aldona M. Yeager; Eugene Yentsch;  
Patricia Yentsch; Cheryl J. Yespy; Estate of  
Chester L. Yinger; Joseph Yinger; Ronald Yingling;  
Deanna Yocum; James Yocum; Paul E. Yoder;  
Shirley Yoder; Goldie F. Yoffee; Estate of Samuel H. Yoffee;  
Arline H. Yohn; James R. Yohn; Estate of  
Katherine Ann Yohn; Ross Yohn; Deborah York; Estate of  
Mark York; Estate of Matthew York; Robert C. York, Jr.;  
Estate of Eleanor Yost; Melinda Yost; Beryl S. Young;  
Estate of Lewis T. Young; Agnes A. Zapcic;  
James S. Zapcic; Pauline Zarkin; Estate of Samuel Zarkin;  
Colin Kelley Zeager; Ruby Carol Zeager; Colby M. Zeiders,  
a minor; Deborah S. Zeiders; K. Richard Zeiders;  
Charles M. Zeigler; Mary E. Zeigler; Estate of Brian Zeller;  
Estate of Eric E. Zeller; Joanne Zeller; Barbara Zendal;  
Estate of Donald N. Zendal; Betty J. Zerbe; Floyd B. Zerbe;  
Estate of Leon R. Zerbe; Donald R. Zimmerman;  
Marion A. Zimmerman; Estate of Sara Zuckerman;  
Chris Zuna, a minor; Gizella R. Zuvich; Estate of  
Louis G. Zuvich





Filed July 26, 1991

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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Nos. 90-5312/13/14/15/16/17/18, 90-5562,  
90-5671/72/73

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IN RE: TMI LITIGATION  
CASES CONSOLIDATED II

Brannon, James T., et al,

vs.

Babcock & Wilcox Company, Inc., et al.

General Public Utilities Corporation,  
Metropolitan Edison Company, New Jersey  
Central Power & Light Company,  
Pennsylvania Electric Company, Babcock &  
Wilcox Company, McDermott Incorporated,  
U.E.&C.- Catalytic, and Burns & Roe  
Enterprises, Inc., Dresser Industries,

*Appellants* in Nos. 90-5312 and 90-5672

(D.C. Civ. Nos. 426 S 1985, 771/72/73/74 S  
1985, 861 S 1985, 1052 S 1985, 1147/48 S 1985,  
1175 S 1985, 1220/21/22 S 1985, 1224 S 1985,  
1402/03 S 1985, 1465 S 1985, 1565/66 S 1985,  
1649 S 1985, 1674 S 1985, 1677/78 S 1985,  
1681 S 1985, 1694 S 1985, 1742 S 1985,  
1748/49/50 S 1985, 1793 S 1985, 3890 S 1985,  
3892 S 1985, 3929 S 1985, 4179 S 1985, 4188 S  
1985, 4314 S 1985, 194 S 1986, 327/28 S 1986,  
1827 S 1985, 1929 S 1985, 2016 S 1985, 2087 S

1985, 2096 S 1985, 2239 S 1985, 2294 S 1985,  
2364 S 1985, 2481 S 1985, 2507/08 S 1985,  
2536 S 1985, 2679 S 1985, 2796 S 1985,  
2837/38 S 1985, 2873 S 1985, 2994 S 1985,  
3004 S 1985, 3056 S 1985, 3117 S 1985, 3337 S  
1985, 543 S 1986, 739 S 1986, 853 S 1986,  
976/77 S 1986, 1149 S 1986, 1531 S 1986, 1768  
S 1986, 1780 S 1986, 2012 S 1986, 2110 S 1986,  
2967/68 S 1986, 3764 S 1986, 359 S 1987, 368  
S 1987, 421 S 1987, 728 S 1987, 995 S 1987,  
1080 S 1987, 1874 S 1987, 0009 S 1988, 481 S  
1988, 88-1452/53/54/55/ 56/57/58/59/60/61,  
88-1466/67/68/69/70/71/72/73/74/75/76/77  
/78/79/80/81/82/83/84/85/86/87/88/89/90/91  
/92/93/94, 88-1496/97/98/  
99/1500/01/02/03/04/05/06/07/08/09/10/11/1  
2/13/14/15/16/17/18/19/  
20/21/22/23/24/25/26, 88-1540, 88-  
1546/47/48/49, 88-1551, 88-  
1553/54/55/56/57/58, 88-1570, 88-1670, 88-  
1706, 88-1807, 89-0049, 89-0105, 89-0271, 89-  
0332, 89-0660, 89-1208, 89-1204, 89-1503, 88-  
01538)

ANDREA LEWINTER,  
Personal Representative of  
the Estate of MARK LEWINTER;

vs.

GENERAL PUBLIC UTILITIES CORP.;  
METROPOLITAN EDISON COMPANY;  
JERSEY CENTRAL POWER & LIGHT CO.;  
PENNSYLVANIA ELECTRIC COMPANY;  
BABCOCK & WILCOX COMPANY;  
J. RAY MCDERMOTT & COMPANY;  
CATALYTIC, INC.; and  
BURNS & ROE, INC.

General Public Utilities Corporation,  
Metropolitan Edison Company, New Jersey  
Central Power & Light Company,  
Pennsylvania Electric Company, Babcock &  
Wilcox Company, McDermott Incorporated,  
Burns & Roe Enterprises, Inc., and  
U.E.&C.- Catalytic,

*Appellants in No. 90-5313*

(D.C. Civil No. 88-01550)

PERRI C. KILICK; and  
EDWARD KILICK, husband and wife

vs.

METROPOLITAN EDISON CO.;  
GENERAL PUBLIC UTILITIES CORP.; and  
BABCOCK AND WILCOX COMPANY

General Public Utilities Corp., Metropolitan  
Edison Company, and Babcock & Wilcox  
Company,

*Appellants in No. 90-5314*

(D.C. Civil No. 88-01552)

JOHN W. GUMBY, SR.

vs.

GENERAL PUBLIC UTILITIES CORP.;  
METROPOLITAN EDISON COMPANY;  
JERSEY CENTRAL POWER & LIGHT CO.;  
PENNSYLVANIA ELECTRIC COMPANY;  
BABCOCK & WILCOX COMPANY;  
J. RAY MCDERMOTT & COMPANY;  
CATALYTIC, INC.;  
BURNS & ROE ENTERPRISES, INC.

General Public Utilities Corporation,  
Metropolitan Edison Company, New Jersey  
Central Power & Light Company,  
Pennsylvania Electric Company, Babcock &  
Wilcox Company, McDermott Incorporated,  
Burns & Roe Enterprises, Inc., and  
U.E.&C.-Catalytic,

*Appellants in No. 90-5315*

(D.C. Civ. No. 90-00098)

HARRY MONTVILLE;  
VIRGINIA MONTVILLE, in their own right and  
as parents and natural guardians of plaintiff;  
DANIEL ALLEN MONTVILLE

vs.

GENERAL PUBLIC UTILITIES CORP.;  
METROPOLITAN EDISON COMPANY;  
JERSEY CENTRAL POWER & LIGHT CO.;  
PENNSYLVANIA ELECTRIC COMPANY;  
BABCOCK & WILCOX COMPANY;  
J. RAY MCDERMOTT & COMPANY;  
CATALYTIC, INC.;  
BURNS & ROE ENTERPRISES, INC.

General Public Utilities Corporation,  
Metropolitan Edison Company, New Jersey  
Central Power & Light Company,  
Pennsylvania Electric Company, Babcock &  
Wilcox Company, McDermott Incorporated,  
Burns & Roe Enterprises, Inc., and  
U.E.&C.-Catalytic,

*Appellants in No. 90-5316*

(D.C. Civ. No. 90-00370)

JOHN B. ROCHE, III;  
NANCY ELAINE ROCHE;

ERIN KATHLEEN MILLER;  
TIMOTHY MILLER;  
CATHY DAUGHERTY;  
KIM DAUGHERTY;  
RACHEL L. STAUFFER;  
NED E. GROVE,  
individually and as personal representative  
of the Estate of Sylvia K. Grove, deceased;  
ROBERT L. CASSELL, SR.;  
PATRICIA A. CASSELL;  
PAUL D. WALTERICK;  
LINDA D. WALTERICK,  
individually and on behalf of their  
minor child, Paul D. Walterick, Jr.;  
PAUL M. WALTERICK;  
HELEN G. WALTERICK;  
JENNIFER M. WALTERICK

vs.

GENERAL PUBLIC UTILITIES CORP.;  
U.E. & C. CATALYTIC CORPORATION;  
METROPOLITAN EDISON COMPANY;  
JERSEY CENTRAL POWER & LIGHT CO.;  
PENNSYLVANIA ELECTRIC COMPANY;  
BABCOCK & WILCOX COMPANY;  
J. RAY MCDERMOTT & COMPANY;  
BURNS & ROE, INC.

General Public Utilites Corporation,  
Metropolitan Edison Company, New Jersey  
Central Power & Light Company,  
Pennsylvania Electric Company, Babcock &  
Wilcox Company, McDermott Incorporated,  
Burns & Roe Enterprises, Inc., and  
U.E.&C.-Catalytic,

*Appellants* in No. 90-5317

(D.C. Civ. No. 90-00530)

MARGARET KRAFFT

vs.

GENERAL PUBLIC UTILITIES CORP.;  
METROPOLITAN EDISON COMPANY;  
JERSEY CENTRAL POWER & LIGHT CO.;  
PENNSYLVANIA ELECTRIC COMPANY;  
BABCOCK & WILCOX CO.;  
J. RAY MCDERMOTT & COMPANY;  
CATALYTIC, INC.;  
BURNS & ROE ENTERPRISES, INC.

General Public Utilities Corporation,  
Metropolitan Edison Company, New Jersey  
Central Power & Light Company,  
Pennsylvania Electric Company, Babcock &  
Wilcox Company, McDermott Incorporated,  
Burns & Roe Enterprises, Inc., and  
U.E.&C.-Catalytic,

*Appellants* in No. 90-5318

(D.C. Civ. No. 90-00531)

IN RE: TMI LITIGATION  
CASES CONSOLIDATED II

Brannon, James T., et al,

vs.

Babcock & Wilcox Company, Inc., et al.

General Public Utilities Corp., Metropolitan  
Edison Company, New Jersey Central Power  
& Light Company, Pennsylvania Electric  
Company, Babcock & Wilcox Company,  
McDermott Incorporated, U.E.&C.- Catalytic,  
and Burns & Roe Enterprises, Inc., Dresser  
Industries,

*Appellants* in Nos. 90-5562



(D.C. Civ. Nos. 426 S 1985, 771/72/73/74 S 1985, 861 S 1985, 1052 S 1985, 1147/48 S 1985, 1175 S 1985, 1220/21/22 S 1985, 1224 S 1985, 1402/03 S 1985, 1465 S 1985, 1565/66 S 1985, 1649 S 1985, 1674 S 1985, 1677/78 S 1985, 1681 S 1985, 1694 S 1985, 1742 S 1985, 1748/49/50 S 1985, 1793 S 1985, 3890 S 1985, 3892 S 1985, 3929 S 1985, 4179 S 1985, 4188 S 1985, 4314 S 1985, 194 S 1986, 327/28 S 1986, 1827 S 1985, 1929 S 1985, 2016 S 1985, 2087 S 1985, 2096 S 1985, 2239 S 1985, 2294 S 1985, 2364 S 1985, 2481 S 1985, 2507/08 S 1985, 2536 S 1985, 2679 S 1985, 2796 S 1985, 2837/38 S 1985, 2873 S 1985, 2994 S 1985, 3004 S 1985, 3056 S 1985, 3117 S 1985, 3337 S 1985, 543 S 1986, 739 S 1986, 853 S 1986, 976/77 S 1986, 1149 S 1986, 1531 S 1986, 1768 S 1986, 1780 S 1986, 2012 S 1986, 2110 S 1986, 2618 S 1986, 2967/68 S 1986, 3764 S 1986, 359 S 1987, 368 S 1987, 421 S 1987, 728 S 1987, 995 S 1987, 1080 S 1987, 1874 S 1987, 0009 S 1988, 481 S 1988, 88-1452/53/54/55/56/57/58/59/60/61, 88-1466/67/68/69/70/71/72/73/74/75/76/77/78/79/80/81/82/83/84/85/86/87/88/89/90/91/92/93/94, 88-1496/97/98/99/1500/01/02/03/04/05/06/07/08/09/10/11/12/13/14/15/16/17/18/19/20/21/22/23/24/25/26, 88-1540, 88-1546/47/48/49/50/51/52/53/54/55/56/57/58, 88-1570, 88-1670, 88-1706, 88-1807, 89-0049, 89-0105, 89-0271, 89-0332, 89-0660, 89-1028, 89-1204, 89-1503, 90-98, 90-370, 90-530/31, 88-01538)

IN RE: TMI LITIGATION  
CASES CONSOLIDATED II

Brannon, James T., et al.,

vs.

Babcock & Wilcox Company, Inc., et al.

United States of America,

Defendant-Intervenor

*Appellant* in Nos. 90-5671 and 90-5673

(D.C. Civ. Nos. 426 S 1985, 771/72/73/74 S  
1985, 861 S 1985, 1052 S 1985, 1147/48 S 1985,  
1175 S 1985, 1220/21/22 S 1985, 1224 S 1985,  
1402/03 S 1985, 1465 S 1985, 1565/66 S 1985,  
1649 S 1985, 1674 S 1985, 1677/78 S 1985,  
1681 S 1985, 1694 S 1985, 1742 S 1985,  
1748/49/50 S 1985, 1793 S 1985, 3890 S 1985,  
3902 S 1985, 3929 S 1985, 4179 S 1985, 4188 S  
1985, 4314 S 1985, 194 S 1986, 327/28 S 1986,  
1793 S 1985, 1827 S 1985, 1929 S 1985, 2016 S  
1985, 2087 S 1985, 2096 S 1985, 2239 S 1985,  
2294 S 1985, 2364 S 1985, 2481 S 1985,  
2507/08 S 1985, 2536 S 1985, 2679 S 1985,  
2796 S 1985, 2837/38 S 1985, 2873 S 1985,  
2994 S 1985, 3004 S 1985, 3056 S 1985, 3117 S  
1985, 3337 S 1985, 543 S 1986, 739 S 1986, 853  
S 1986, 976/77 S 1986, 1149 S 1986, 1531 S  
1986, 1768 S 1986, 1780 S 1986, 2012 S 1986,  
2110 S 1986, 2618 S 1986, 2967/68 S 1986,  
3764 S 1986, 359 S 1987, 368 S 1987, 421 S  
1987, 728 S 1987, 1874 S 1987, 0009 S 1988,  
481 S 1988, 88-1452/53/54/55/  
56/57/58/59/60/61, 88-  
1466/67/68/69/70/71/72/73/74/75/76/77/  
78/79/80/81/82/83/84/85/86/87/88/89/90/91/  
92/93/94, 88-1496/97/ 98/99/1500/01/02/03/  
04/05/06/07/08/09/10/11/12/13/14/15/16/17/  
18/19/20/21/22/23/24/25/26, 88-1540, 88-

1546/47/48/49, 88-1551, 88-1553/54/55/56/57/58, 88-1570, 88-1670, 88-1706, 88-1807, 89-0049, 89-0105, 89-0271, 89-0332, 89-0660, 89-1028, 89-1204, 89-1503, 88-1550, 88-1552, 90-98, 90-370, 90-530/31, 995 S 1987, 1080 S 1987, 88-01538)

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Appeal from the United States District Court  
for the Middle District of Pennsylvania

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Argued  
February 7, 1991  
Before: MANSMANN, SCIRICA and  
HIGGINBOTHAM, *Circuit Judges*.

(Opinion filed: July 26, 1991)

---

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for List of Parties

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Strauss, Inc., Gettysburg Tours, Inc.,  
Heritage Inns, Inc., Le Smith Wholesale,  
Lincoln Heritage Inc., Overview Limited,  
SMG Investments

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Twenty-Two Corp., James Cosgrove, Glass  
Kitchens, Cherry Lane Mtr. Inn, Richard  
M. Rutt, Noah N. Martin Co., Cont. Inns of  
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Light Company, Pennsylvania Electric

Company, Babcock & Wilcox Company,  
McDermott Inc., UE&C - Catalytic, Inc.,  
Burns & Roe Enterprises Inc., Dresser  
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COUNSEL FOR APPELLANT, United  
States of America

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**OPINION OF THE COURT**

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MANSMANN, *Circuit Judge*.

In this matter growing out of the 1979 incident at the Three Mile Island nuclear facility near Harrisburg, Pennsylvania, we are asked once again to resolve a confrontation between an assertion of federal jurisdiction over public liability actions by defendants and a challenge to that jurisdiction by plaintiffs who wish to be in the state court system. We previously visited a similar issue in *Klick v. Metropolitan Edison Co.*, 784 F.2d 490 (3d Cir. 1986), and *Stibltz v. General Pub. Util. Corp.*, 746 F.2d 993 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985), and concluded there that Congress did not intend that there be a federal cause of

action arising under the terms of the Price-Anderson Act (codified in scattered sections of 42 U.S.C.).

Our focus here is on the constitutionality of the Price-Anderson Amendments Act of 1988, 42 U.S.C. § 2100 *et seq.* In the Amendments Act, Congress expressly created a federal cause of action for nuclear accident claims and is alleged to have worked major changes in the landscape of public liability law.

Specifically, our review centers upon a district court order remanding certain public liability actions to the state courts in which they were originally filed or in which they might have been filed. The district court concluded that it lacked federal subject matter jurisdiction over these claims and that remand was appropriate under the terms of 28 U.S.C. § 1447(c).<sup>1</sup> The district court reached this decision despite the fact that the Price-Anderson Amendments Act of 1988, which created the federal public liability action, specifies that the federal courts have original jurisdiction over these actions and that public liability actions filed in state courts, which have concurrent jurisdiction, are subject to removal upon the motion of a defendant, the Nuclear Regulatory Commission, or the Secretary of Health and Human Services, 42 U.S.C. § 2210(n)(2).

The district court's determination with respect to subject matter jurisdiction rested not on any failure to satisfy the jurisdictional requirements of the Amendments Act but upon the court's conclusion that the Amendments Act itself was

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1. This section provides, in pertinent part, that, "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."



unconstitutional. Underlying the remand order was the district court's holding that Congress, in purporting to create a federal forum for public liability actions through the Amendments Act, exceeded the authority granted to it by Article III, Section 2 of the United States Constitution.

Because it believed that its order granting the plaintiffs' motion to remand involved a "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation," the district court stayed execution of the remand and certified for immediate appeal, pursuant to 28 U.S.C. § 1292(b), the following question:

Whether Congress exceeded the scope of Article III, Section 2 of the United States Constitution by granting federal courts subject matter jurisdiction over public liability actions through the Price-Anderson Amendments Act of 1988.

The defendants, in an abundance of caution, filed petitions for permission to appeal, notices of appeal pursuant to 28 U.S.C. § 1291 and petitions for a writ of mandamus pursuant to 42 U.S.C. § 1651. The petitions for permission to appeal were granted and the appeals arising from these petitions were then consolidated with the direct appeals. (We refer to these consolidated matters as "the appeal.")

The procedural posture of this case raises a serious threshold question concerning our jurisdiction, under any of the three bases asserted, to hear this appeal. The district court's remand order, although it was stayed pending the outcome of this appeal, arguably implicates a statutory bar to our consideration of any aspect of the remand

order, including the constitutional determination upon which it was based. 28 U.S.C. § 1447(d) provides that except for civil rights cases removed pursuant to 28 U.S.C. § 1443, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ."

Because we are convinced that the bar of section 1447(d) was not intended to preclude appellate consideration of a section 1292(b) certified question concerning the constitutionality of an Act of Congress, (here, the Price-Anderson Amendments Act of 1988), we will address the merits of the question certified. We find that the grant of federal jurisdiction set forth in the Amendments Act does not transgress the limits of Article III, Section 2 of the United States Constitution, and thus we will vacate the order of the district court.

#### I.

The procedural history of many of the public liability actions before us in this appeal has followed the course of a pendulum as statutory and constitutional interpretation has operated to move these actions back and forth between the state and the federal courts. We recount this history in detail since it bears directly on the jurisdictional issues to be resolved.

These eleven consolidated appeals have their origin in suits filed in the Pennsylvania state courts and in the Mississippi state and federal courts as a result of radiation leaks alleged to have occurred on March 28, 1979 at the Three Mile Island nuclear energy electric generating plant in Dauphin County, Pennsylvania. In these suits, approximately two thousand plaintiffs who resided

near the Three Mile Island facility at the time of the incident allege clinical and subclinical conditions resulting from exposure to radiation released from the facility; numerous plaintiffs assert claims based on fear of the effects of radiation. Other claims, based upon loss of trade, were filed by seventy-two tourist-related businesses operating in nearby counties.

The defendants in these suits were, at the time of the Three Mile Island incident, the owners and operators of the nuclear facility, companies which had provided design, engineering or maintenance services, and those vendors of equipment or systems installed in the facility. The defendants deny that the March 28, 1979 release of radiation caused any harm.

Some of the cases now pending were originally filed in the early 1980's in several Pennsylvania Courts of Common Pleas and state courts in Bergen County, New Jersey and Jackson County, Mississippi, and were removed by the defendants to the United States District Courts in Pennsylvania and in Mississippi. The defendants asserted as grounds for removal that the plaintiffs' claims arose under the Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended in various sections of 42 U.S.C.).<sup>2</sup>

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2. The Price Anderson Act was enacted in 1957 as an amendment to the Atomic Energy Act. Recognizing a substantial federal interest in regulating the safety aspects of the nuclear power industry, Congress sought to encourage the involvement of the private sector in the development of nuclear power by limiting the liability which might be associated with a nuclear incident. In order to encourage private participation in the nuclear energy industry and to ensure that those who might be injured would be adequately

Following our rulings in *Stibitz v. General Pub. Util. Corp.*, 746 F.2d 993, 997 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985); and *Klick v. Metropolitan Edison Co.*, 784 F.2d 490, 493 (3d Cir. 1986), that the Price-Anderson Act created no federal tort cause of action and was not intended to confer jurisdiction upon the federal courts, the actions originally filed in the state courts were remanded and those few which had been brought originally in the federal court were transferred to the state courts via state law procedure. New claims arising out of the same incident continued to be filed in the state courts.

In August of 1988, Congress enacted the Price-Anderson Amendments Act of 1988. Pub. L. No. 100-408, 102 Stat. 1066 (1988). By this Act, Congress expressly created a federal cause of action for "public liability actions" which were defined as "any suit asserting public liability." 42 U.S.C. § 2014(hh).<sup>3</sup> The Amendments also provided, in 42 U.S.C. § 2014(hh), that public

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compensated, Congress established a system of private insurance and government indemnity.

Under the Act, nuclear facilities operators were required to purchase a specified amount of insurance from private carriers. Provision was made for government indemnification above the insurance amounts to an established aggregate limit on liability. See 42 U.S.C. §§ 2210(a)-(c), (e).

3. "Public liability" had been defined in the Price-Anderson Act prior to the Amendments as "any legal liability arising out of or resulting from a nuclear incident or precautionary evaluation." 42 U.S.C. § 2014(w). This definition was not affected by the Amendments. Also not affected was the definition of "nuclear incident" which appears at 42 U.S.C. § 2014(q):

liability actions shall be deemed to arise under the Price-Anderson Act. Thus the federal courts were granted original jurisdiction over these actions; any public liability actions pending or filed in the state courts were subject to removal. 28 U.S.C. § 2210(n)(2).

Following enactment of the Amendments Act on August 20, 1988, the defendants removed the actions underlying these appeals to the United States District Court for the Middle District of Pennsylvania. On October 7, 1988, the plaintiffs filed a petition seeking to have the removed actions remanded to the state courts on the ground that Congress lacked authority to create a federal forum for public liability actions inasmuch as these actions, despite Congress' explicit statement to the contrary, did not "arise under" federal law. The defendants opposed this petition; the United States government intervened in the proceedings pursuant to 28 U.S.C. § 2403 and also opposed the petition.

On March 16, 1990, the district court granted the petition for remand. Holding that Congress' grant of federal jurisdiction over public liability actions would require that the federal courts apply the same law which a state court would have applied in an action under state common law, the

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The term 'nuclear incident' means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material. . . ."

district court concluded that the Amendments Act accomplished only the creation of a federal forum for the public liability actions. In the district court's view, the Amendments Act did not change the fact that the plaintiffs' rights arose under state law rather than under the federal statute. Because it did not believe that the Amendments Act's grant of federal jurisdiction over public liability actions could withstand constitutional attack, the district court concluded that it lacked subject matter jurisdiction over the plaintiffs' claims and was required to remand the actions to the state courts pursuant to 28 U.S.C. § 1447(c). In so holding, the district court recognized that there was a substantial ground for difference of opinion regarding the constitutionality of the Amendments. The district court, therefore, certified the constitutional question for immediate appeal pursuant to 28 U.S.C. § 1292(b).

The United States and the defendants filed timely petitions for permission to appeal. The plaintiffs and the United States filed motions for partial reconsideration and for reconsideration, respectively. The defendants also filed a notice and an amended notice of appeal.

By order entered June 14, 1990, the district court denied the plaintiffs' motion for partial reconsideration and the motion filed by the United States for reconsideration. All of the defendants filed timely notices of appeal from the district court orders filed June 14, 1990 and March 16, 1990. Petitions for a Writ of Mandamus were also filed. On July 12, 1990, we granted the petitions for permission to appeal, consolidating the permissive appeals with the direct appeals.

## II.

## A.

The threshold question before us is whether we have jurisdiction to consider any aspect of the district court order in view of the bar to appellate review of remand orders set forth in 28 U.S.C. § 1447(d). The jurisdictional issue is substantial and has been ably briefed and argued. Our task is to determine whether Congress intended to insulate from review those remand orders which rest on the district court's finding that it lacks subject matter jurisdiction because the statute containing the grant of federal jurisdiction is, itself, unconstitutional.

The defendants argue that there are three separate bases upon which we might rely in order to review the district court order. The first involves the permissive appeal provisions of 28 U.S.C. § 1292(b). The defendants also assert that the district court order is final within the meaning of the collateral order exception to 28 U.S.C. § 1291 and contend that the district court order is properly reviewable pursuant to a writ of mandamus authorized by 42 U.S.C. § 1651.

The plaintiffs respond with a number of conclusions respecting our jurisdiction, all centering on 28 U.S.C. § 1447(d): 28 U.S.C. § 1447(d) bars this court from hearing an appeal by permission under 28 U.S.C. § 1292(b) from a district court decision holding the Price-Anderson Act Amendments of 1988 to be unconstitutional; 28 U.S.C. § 1447(d) prohibits this court's review of a direct appeal; and issuance of a writ of mandamus, pursuant to 28 U.S.C. § 1651, is also barred by 28 U.S.C. § 1447(d).



Although we have been invited to bypass direct consideration of the reach of the Section 1447(d) bar,<sup>4</sup> we are convinced that this case requires head-on confrontation. We turn, therefore, to the language and history of section 1447(d).

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4. The defendants have argued that the 42 U.S.C. § 1447(d) bar to review applies only to remand orders entered pursuant to section 1447(c) and that the remand provisions of section 1447(c), in turn, apply only to those actions removed pursuant to 42 U.S.C. § 1441. Despite the district court's explicit statement that "the decision to remand the case at bar is based on § 1447(c)," the defendants argue that section 1447(c) has no application to cases removed under the Price-Anderson Amendments Act of 1988, 42 U.S.C. § 2210(n), rather than under the general removal provision of § 1441.

This argument appears to have its origins in our decision in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984). In *Pacor*, we held that the general removal provisions of 28 U.S.C. §§ 1441-1447 had no application to cases removed to the bankruptcy court under the provisions of former 28 U.S.C. § 1478 (amended and now codified as 28 U.S.C. § 1452). We reasoned that section 1478(a) authorized a type of removal not contemplated by section 1441. Where the general removal provisions provided only for removal from a state court to a federal district court, section 1478(a) authorized removal of a proceeding from *any* other court to the *bankruptcy* court. Under the former bankruptcy law, the bankruptcy and district courts were separate entities. We also noted that while section 1478 provided that *any party* could initiate removal to the bankruptcy court, section 1441 permitted defendants alone to seek removal. Relying upon these differences in the provisions for removal, we concluded that the statutory conflicts and inconsistencies which resulted from attempting to reconcile the general removal provisions with the terms of section 1478(a) demonstrated that these general provisions could not have been intended to apply to bankruptcy removals.

The narrow holding in *Pacor* was read broadly by the Court of Appeals for the Eleventh Circuit in *In re Federal Sav. and Loan Ins. Corp.*, 837 F.2d 432 (11th Cir. 1988). The court held that the section 1447(d) bar did not apply to review of

## B.

Section 1447(d) states clearly that, except for civil rights cases removed pursuant to 28 U.S.C. § 1443, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ." This statutory bar to

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remand orders in cases removed pursuant to 12 U.S.C. § 1730(k)(1), the statutory provision which authorizes the FSLIC, when acting as receiver for a federal savings and loan association, to remove to federal court any state court suit to which it is a party. The remand provision of section 1447(c) was intended to apply only to cases removed pursuant to 28 U.S.C. § 1441, and not to cases removed pursuant to statutes with special grants of federal jurisdiction and removal rights, . . . ."

The defendants invite us to apply the rationale of *In re FSLIC* and to hold that section 1447(d) does not operate to bar review of cases removed under the provisions of the Price-Anderson Amendments Act of 1988 rather than under section 1441. This approach is not viable in light of the Supreme Court's decision in *United States v. Rice*, 327 U.S. 742 (1946). In *Rice*, the Supreme Court interpreted the statutory forerunner of section 1447(d) to bar review of a remand order even where removal had been effected pursuant to a statute creating federal jurisdiction in cases involving federally restricted land interests of an Indian. The Supreme Court held that the bar to review was "intended to be applicable not only to remand orders made in suits removed under [the general removal statutes], but to orders of remand made in cases removed under any other statutes, as well." *Id.* at 752.

Citing *Rice*, at least one other court has declined to follow the ruling in *In re FSLIC*. See *Federal Savings and Loan Ass'n v. Frumenti Dev. Corp.*, 857 F.2d at 669. We find the reasoning in *Frumenti* persuasive and conclude that *Rice* prevents our holding that section 1447(d) does not extend to review of remand orders in cases removed pursuant to 42 U.S.C. § 2210(n).

appellate review of remand orders was first codified in Section 2 of the Judiciary Act of March 3, 1887 (24 Stat. 552, reenacted to correct errors in enrollment, August 13, 1888, 25 Stat. 443).<sup>5</sup>

Whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court remanding such cause shall be allowed.

Section 2 was reenacted in the Judicial Code of 1911, 36 Stat. 1094 as 28 U.S.C. § 71. "These provisions for the disposition of removed cases where jurisdiction was lacking or removal was otherwise improper, together with the prohibition of appellate review . . . endured until 1948 when 28 U.S.C. § 1447 was enacted — minus, however, the prohibition against appellate review. The omission was corrected in 1949 when the predecessor of the present subsection (d) came into being." *Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. 336, 347-48 (1976) (footnotes omitted). As adopted in 1948, and amended in 1964, section 1447(c) provided, in pertinent part, that:

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5. The history of what is now section 1447(d) is set forth in *United States v. Rice*, 327 U.S. 742, 748-49 (1946). Prior to "the Judiciary Act of March 3, 1875, 18 Stat. 470, 472, an order of remand was deemed to be not reviewable by appeal or writ of error because the order was not final. . . . But § 5 of the Act of 1875 expressly authorized the review of an order of remand by appeal or writ of error 'in any suit' removed from a state court. This provision was repealed by § 6 of the Act of 1887 . . . ." *Rice*, 327 U.S. at 748.

If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs.<sup>6</sup>

As amended in 1949, 28 U.S.C. § 1447(d) read, "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ." "Th[is] subsection took its present form in 1964, when Congress amended the subsection to provide for review of cases removed pursuant to 28 U.S.C. § 1443." *Thermtron*, 423 U.S. at 348 n.13.

With the brief exception, then, of the period between 1875 and 1887, Congress, by adopting section 1447(d) and its statutory predecessors, "established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed. This was accomplished by denying any form of review of an order of remand, and, before final judgment, of an order denying remand." *United States v. Rice*, 327 U.S. at 751. One commentator describes the policy underlying section 1447(d) as "[Congress'] . . . explicit legislative choice . . . that avoiding delay in court proceedings caused by lengthy appellate review of remand decisions merits sacrificing appellate

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6. This section was amended in 1988, Pub. L. No. 100-702, Title X, § 1016(c), 102 Stat. 4670, to provide in pertinent part that, "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." It is the amended provision which controls here.

review to correct occasional errors in remand orders." Herrmann, *Thermtron Revisited: When and How Federal Trial Court Remand Orders are Reviewable*, 19 Arizona St. L. J. 395, 413 (1987-88) (footnote omitted) (hereinafter "Herrmann").<sup>7</sup> In furtherance of this policy, section 1447(a) was interpreted, until 1976, to preclude review of all remand orders, regardless of the reasons underlying the decision to remand.

C.

In 1976, the Supreme Court decided *Thermtron Prod., Inc. v. Hermansdorfer*, 423 U.S. at 336. There, Kentucky residents filed a personal injury action against Indiana residents in a Kentucky state court. The action was removed to the United States District Court pursuant to 28 U.S.C. §§ 1441 and 1446. The district court reviewed the crowded state of its docket and held that although the plaintiffs had the statutory right to litigate their claims in the federal court, that right had to be "balanced against the plaintiffs' right to a forum of their choice and their right to a speedy decision on the merits of their cause of action." *Id.* at 340. Because it concluded that the matter could be brought to more efficient resolution in the state courts and that the petitioners had failed to demonstrate that they would be prejudiced by having their case heard in that forum, the district court ordered the matter remanded. The plaintiffs sought a writ of mandamus or prohibition compelling the district court to exercise jurisdiction over the properly-removed action. The

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7. For similar statements of the purpose underlying the section 1447(d) bar to review of remand orders, see the cases cited in Herrmann, *supra*, at 413 n.105.

Court of Appeals for the Sixth Circuit denied the petition, relying on the statutory bar to review set forth in section 1447(d).

Reversing, the Supreme Court clarified that the section 1447(d) bar operates to preclude review of only those remand orders issued pursuant to section 1447(c). The Court held that these sections must be construed together and that "only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d)." *Thermtron*, 423 U.S. at 346. The district court in *Thermtron* had questioned neither the propriety of the removal nor the jurisdiction of the federal court; the terms of section 1447(c) were not mentioned in the remand order and could not have been applicable. Recognizing that it was creating an exception to what had been interpreted as an absolute bar to review, the Court wrote:

There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, . . . Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c), whether or not that order might be deemed erroneous by an appellate court. But we are not convinced that Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute . . . . Because the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the writ of mandamus was not barred by § 1447(d).



*Id.* at 351. Mandamus was held to be "an appropriate remedy to require the District Court to entertain the remanded action." *Id.* at 352.

Although the rule that most remand orders are not subject to review remains, *Thermtron* made clear that the seemingly unequivocal language of section 1447(d), may, in extraordinary circumstances, give way to permit appellate consideration of certain categories of remand orders. Mandamus has been invoked in a number of cases since *Thermtron* to require federal courts to adjudicate claims not remanded on jurisdictional grounds. See, e.g., *Air-Shields, Inc. v. Fullam*, 891 F.2d 63 (3d Cir. 1989) (petition for writ of mandamus was granted directing the court to vacate a remand order based upon procedural defects not contemplated by section 1447(c)); and *Nasutt v. Scannell*, 906 F.2d 802 (1st Cir. 1990) (review by mandamus was appropriate where the district court's remand order lacked statutory basis and was clearly contrary to congressional policy as expressed in the Westfall Act).

Another detour around the absolute bar of section 1447(d) has been fashioned by the Court of Appeals for the Ninth Circuit in *Pelleport Investors, Inc. v. Budco Quality Theaters, Inc.*, 741 F.2d 273 (9th Cir. 1984), and *The Clorox Co. v. United States District Court*, 756 F.2d 699 (9th Cir.), *rev'd on reh'g*, 779 F.2d 517 (9th Cir. 1985).

In *Pelleport* the plaintiff sued in a California state court for the recovery of rental fees. The case was removed to the federal court on diversity grounds. The defendant filed a motion to remand the case to the state court, relying on a contractual forum selection clause. Although it found that diversity existed and that the federal



court, therefore, had subject matter jurisdiction over the actions, the district court granted the motion for remand on the ground that the forum selection clause was valid and enforceable. The plaintiff appealed from the remand order and filed a petition for mandamus. The court of appeals addressed the applicability of section 1447(d), concluding that it did not operate to bar review of the remand order. Recognizing that the case did not fall within the narrow exception to section 1447(d) carved out by *Thermtron*, the court of appeals nonetheless determined that review was appropriate. Because the remand order at issue was mandated by a substantive decision on the merits apart from the jurisdictional determination, the court concluded that section 1447(d) did not apply. In reaching this result, the court relied on the Supreme Court's decision in *Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140 (1934).

*Waco* involved a Texas state court action which was removed to the federal court on diversity grounds by a third party defendant. When the district court dismissed the third party action, diversity was destroyed and the case was remanded to the state court. Holding that the dismissal of the third party action was not immune from review, the Supreme Court wrote:

True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. Indisputably this order is the subject of an appeal; and, if not reversed or set aside, is conclusive upon the petitioner.

*Waco*, 293 U.S. at 143.

The court of appeals in *Pelleport* read *Waco* as "stand[ing] for the proposition that although the final determination that diversity is lacking is not reviewable, the earlier determination that a third party defendant must be dismissed from the action is." *Pelleport*, 741 F.2d at 277. Reasoning that the case before it also involved a substantive issue of contract law which preceded and formed the basis of the remand order, the court concluded that:

Like the dismissal in *Waco*, the court's decision that the contract clause is enforceable, if not reversed or set aside, is conclusive upon [the defendant], and, therefore, must be reviewed. To hold otherwise would deprive [the defendant] of its right to appeal a substantive determination of contract law. We cannot believe that Congress intended to immunize such decisions from review.

*Id.*

The court also reviewed the strong policy underlying section 1447(d) but found that

Any delay caused by an appeal of the contract issue is a delay that must be countenanced. To apply section 1447(d) to the district court's decision on the enforceability of the forum selection clause would extend the scope of section 1447(d) far beyond its intended parameters and would leave matters of substantive contract law unreviewable. We refuse to impute such an intent to Congress.

*Id.* Thus the district court's order was held to be reviewable as a collaterally final order within the meaning of 28 U.S.C. § 1291. Following review on the merits of the district court's forum selection

ruling, the order remanding the case to the California state court was affirmed.

Again, in *The Clorox Co. v. United States District Court*, 779 F.2d at 517, the Court of Appeals for the Ninth Circuit held that an appeal would lie from a remand order which had been preceded by a substantive decision on the merits. In *Clorox*, the defendant employer had granted to its employees, via an employee benefits handbook, the right to file suit to recover benefits in either a state or federal court. When claims were filed in the state court, however, Clorox removed the actions to the federal court. The plaintiffs filed a motion for remand arguing that the handbook provision constituted a waiver of Clorox's removal rights. The district court accepted this argument and remanded the case pursuant to section 1447(c). While the court of appeals originally declined jurisdiction, holding that review of the remand order could be secured only through appeal rather than mandamus, on rehearing the court construed the petition for writ of mandamus as a notice of appeal and granted Clorox's request for relief. The court again addressed the reach of section 1447(d):

When a district court's remand order is based on a resolution of the merits of some matter of substantive law "apart from any jurisdictional decision," section 1447(d) does not foreclose appellate review of that decision.

*Clorox*, 779 F.2d at 520 (quoting *Pelleport*, 741 F.2d at 276-77). Concluding that the district court had remanded on the basis of Clorox's waiver of the right to remove and that a remand on this basis did not fall within the purview of section 1447(c), the court held that the remand order was appealable as a collateral final order pursuant to 28 U.S.C. § 1291.

What has come to be known as the *Clorox/Pelleport* doctrine has been invoked in other cases to support the reviewability of remand orders in cases where the decision to remand was based on a prior determination of substantive law. See *Foster v. Chesapeake Insurance Co.*, No. 90-1752 (3d Cir. May 20, 1991) (order of remand based on contractual forum selection clause is not rendered unappealable by section 1447(d)); *Regts Assoc. v. Rank Hotels (Management) Ltd.*, 894 F.2d 193, 194 (6th Cir. 1990) (remand order based on forum selection clause is reviewable on appeal because it is based upon a substantive decision on the merits of a collateral issue); *In Re Delta America Re Ins. Co.*, 900 F.2d 890, 892 (6th Cir. 1990) (same); and *Karl Koch Erecting Co., Inc. v. New York Convention Center Dev. Corp.*, 838 F.2d 656, 658 (2d Cir. 1988) (same).

D.

With the historical background of section 1447(d) and the caselaw interpreting and limiting the reach of that section in mind, we turn to the appeal now before us. This case, presenting as it does the question of whether section 1447(d) bars all review of a district court's determination that it lacks federal subject matter jurisdiction because the Price-Anderson Amendments Act of 1988 which explicitly authorize removal is unconstitutional, is unique. No case interpreting the reach of section 1447(d) has addressed the particular constitutional dilemma presented here.

The plaintiffs argue that the section 1447(d) bar absolutely prevents our reviewing the district court's conclusion that the Amendments Act is unconstitutional because, as a result of that

ruling, the district court concluded that it lacked subject matter jurisdiction and ordered that the cases at issue be remanded to the state court. We cannot agree. We are convinced that in enacting section 1447(d), Congress did not intend to vest the district courts with the authority to make final determinations regarding the constitutionality of federal statutes. In thus contracting the reach of the section 1447(d) bar, we are acutely aware that we are charting virgin territory in that this case does not fall neatly into either of the previously recognized exceptions to the bar of section 1447(d).

The exception created in *Thermtron* permits review of those remand orders which do not rest upon the grounds specified in section 1447(c). Here the district court relied *specifically* on section 1447(c) in reaching the determination to remand and it would be impossible for us to deny the fact that the district court's conclusions of constitutional law ultimately implicated subject matter jurisdiction.

The *Pelleport/Clorox* exception to the section 1447(d) bar developed by the Ninth Circuit also fails to address directly the issue posed here. The *Pelleport/Clorox* line of cases have allowed appeal from an order of remand where that order was preceded by a substantive decision on the merits apart from any jurisdictional issue. This doctrine is superficially attractive but we do not believe that we can analyze this case solely by reference to it. In each of the cases applying the *Pelleport/Clorox* doctrine, there was an undisputed statutory basis for federal jurisdiction; there was no question that the federal courts had jurisdiction to hear the types of case presented. One of the parties in each of these cases, however, argued that provisions of

a contractual nature, *e.g.*, a forum selection clause or a statement in an employment benefits plan, operated to place the litigation properly in the state courts. It was the resolution of these underlying substantive issues, rather than of basic jurisdictional issues, which supported remand in *Pelleport* and *Clorox*. The basis for subject matter jurisdiction was unaffected.

While the district court's decision in this case that the Amendments Act was unconstitutional *was* a substantive decision preceding the remand order, the heart of this decision was jurisdictional; unless the statute were found to be constitutional, there could be no federal subject matter jurisdiction. Despite its magnitude, we cannot say that the district court's constitutionality ruling was a "substantive decision on the merits *apart from* any jurisdictional decision" within the meaning of *Pelleport* and its progeny. *Pelleport*, 741 F.2d at 276 (emphasis added). We conclude nonetheless that the seeds for appropriate resolution of this matter were sown in *Thermtron* and in the reasoning underlying the *Pelleport/Clorox* doctrine.

We reiterate *Thermtron's* admonition that section 1447(d), in and of itself, is not dispositive of all remand issues and should be interpreted to bar review of only those remand orders which are jurisdictional in nature. Under the terms of section 1447(c), a removal which is made without jurisdiction has been consistently interpreted to mean one not authorized by Congress. Congress "made the district courts the *final* arbiters of *whether Congress intended* that specific actions were to be tried in a federal court." *Thermtron*, 423 U.S. at 355 (Rehnquist, J., dissenting) (latter emphasis added). The Court of Appeals for the Seventh Circuit in *Rothner v. City of Chicago*, 879



F.2d 1402, 1408 (7th Cir. 1989), clarified the scope of the jurisdictional determination when it wrote: "The *Thermtron* Court strongly indicated that it viewed the phrase 'improvidently and without jurisdiction' to mean *noncompliance with the procedural and jurisdictional requirements stated by Congress.*" (Emphasis in original.)

The jurisdictional issues most often resolved by decisions to remand thus involve "the presence or absence of diversity of citizenship or a 'case arising' [and] are threshold questions that can generally be readily resolved by reference to a well-established body of law." Herrmann, *supra*, at 414. See also *Hansen v. Blue Cross of California*, 891 F.2d 1384, 1388 (9th Cir. 1989) (in deciding whether subject matter jurisdiction exists, district court reaches conclusions concerning the presence of diversity or a federal question). While not every federal subject matter jurisdictional issue is easily resolved, the fact that the same types of issue arise repeatedly results in a fairly well-developed body of governing law. Herrmann, *supra* at 414-15 n.110.

The *Thermtron* holding that section 1447(d) bars review only of remand orders issued pursuant to 1447(c) thus has beneficial consequences. It respects Congress' decision to avoid the delay that would be caused by the bulk of remand orders, but restricts that limitation to the category of cases where review is least necessary.

*Id.* at 415.

The district court's ruling holding the Amendments Act to be unconstitutional, despite its jurisdictional component, is not the type of determination routinely and regularly made



pursuant to section 1447(c). The district court's decision that it lacked subject matter jurisdiction did not in any way involve a determination that Congress did not intend to confer federal jurisdiction over public liability actions nor did it result from the conclusion that there had been a failure to satisfy the procedural requirements of the Amendments Act or any of the general removal provisions. It could not be clearer that Congress intended that there be federal jurisdiction over claims removed pursuant to the Amendments Act; the statutory language is explicit.<sup>8</sup> Furthermore, it is undisputed that the actions at issue fall within the statutory terms of the Amendments Act and were properly removed. The district court's conclusion that it lacked subject matter jurisdiction over the removed claims rested *solely* on its determination that Congress exceeded its constitutional authority in enacting the Amendments Act.

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8. The Amendments Act was, at least in part, a response to our decisions in *Stibitz* and *Kitck*. See S. Rep. No. 218, 100th Cong., 2d Sess. 12, reprinted in 1988 U.S. Code Cong. & Admin. News 1476, 1488 (referencing *Stibitz*, the Committee on Environment and Public Works noted that "the bill expands existing law to allow for the consolidation of claims arising out of any nuclear incident in federal court"); and H. R. Rep. No. 104, 1st Sess. pt. 1, 18 (noting our holding that the district court did not have jurisdiction over claims arising from the Three Mile Island incident and referring to language in H.R. 1414 in which Congress expressly stated that any suit asserting public liability shall be deemed to be a cause of action arising under the Price Anderson Act). Thus, in 42 U.S.C. § 2014(hh) Congress states that "[a] public liability shall be deemed to be an action arising under section 2210 of this title . . . .," and in 42 U.S.C. § 2210(n)(2) that "[u]pon motion . . . any [public liability] action pending in any State court . . . shall be removed. . . . (Emphasis added.)

The plaintiffs characterize this constitutional ruling and the resulting remand as purely jurisdictional in nature and argue that the bar of section 1447(d) absolutely prevents our review of the district court's ruling with respect to the constitutionality of the Amendments Act. "No merits issues . . . occurred below. In fact, the lower court only made a jurisdictional determination and found it lacks subject matter jurisdiction." We do not believe that the section 1447(d) question is as easily resolved as the plaintiffs — indeed, all of the parties — might wish.

While we recognize that the district court's ruling on the constitutionality of the Amendments Act has obvious consequences for federal jurisdiction and, unlike the rulings prior to remand in the *Pelleport/Clorox* cases, may be said to have a truly jurisdictional component, we cannot conclude that, in the situation presented here, Congress intended that section 1447(d) operate to prevent appellate review of the district court order. We are confident that the jurisdictional determination of the district court, resting as it did upon the conclusion that the entire statutory scheme authorizing removal is unconstitutional, was not the type of federal subject matter jurisdictional decision intended to be governed by the terms of or the policy underlying section 1447(c). Section 1447(d), therefore, has no application. In order to fall within sections 1447(c) and 1447(d), a remand order must be based upon a finding that removal was not authorized by Congress.

In analyzing the scope of the determinations to be made under section 1447(c) and the resultant applicability of the section 1447(d) bar to review,

we begin with the Supreme Court's axiom reiterated in *Webster v. Doe*, 486 U.S. 592, 603 (1988), that congressional intent to bar judicial review of a constitutional claim must be clearly expressed, and with our own holding in *Pacor, Inc. v. Higgins*, 743 F.2d at 992, that courts will not impose restrictions on access to appellate review unless Congress has expressed that intent by clear and convincing evidence. We do not find clearly expressed congressional intent which would preclude review in the circumstances presented here. To hold otherwise would require that we reach a result wholly at odds with the policy underlying section 1447(d) and with the established general principles applicable to appellate review of constitutional questions.

Reading the finding of subject matter jurisdiction required under section 1447(c) so broadly as to encompass a district court's determination that a statute authorizing removal is itself unconstitutional would produce an unacceptable and unintended shift in the allocation of judicial power between federal and state courts. Because remand orders premised upon section 1447(c) are absolutely unreviewable, on appeal or otherwise, a district court's constitutional determination, if couched in terms of section 1447(c) and followed by a remand order, could *never* be reviewed. Remand orders which are unreviewable under section 1447(d) remain unreviewable even on appeal from the final judgment of a state court. In *Metropolitan Casualty Ins. Co. v. Stevens*, 312 U.S. 563, 568-69 (1941), the Supreme Court wrote that

[T]he issue of removability is closed if the federal district court refuses to assume jurisdiction and

remands the cause. Section 28 of the Judicial Code [now section 1447] precludes review of the remand order directly or indirectly after final judgment in the highest court of the state in which decision could be had. . . .

. . . For the reasons already stated, we are not at liberty to review the remand order.

(Citations omitted.) In *United States v. Rice*, 327 U.S. at 751, the Supreme Court reiterated the nonreviewability of orders of remand falling within section 1447(c):

Congress . . . established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed. This was accomplished by *denying any form of review of an order of remand*, and, before final judgment, of an order denying remand.

(Emphasis added.) Those state cases addressing the reviewability of remand orders have reached a similar conclusion. See *Ramahlt v. Hobart Corp.*, 47 Or. App. 607, 614, 615 P.2d 348, 352 n.7 (1980) (citing absolute bar of section 1447(d)); *Johnson Publshing Co. v. Davls*, 271 Ala. 474, 493, 124 So.2d 441, 456 (1960) ("appellant now seeks to have this court do what a federal appellate court, including the Supreme Court of the United States, is powerless to do, namely, review the order of remandment"); *Wewoka Petroleum Corp. v. Gilmore*, 319 P.2d 285 (Okla. 1957) (order of remand for lack of diversity is not reviewable on appeal).

To read sections 1447(c) and 1447(d) as applying to jurisdictional determinations based upon the

constitutionality of a statute authorizing removal would vastly expand the holding in *Thermtron*. While the Court in *Thermtron* made it clear that "the district courts [are] the *final* arbiters of whether Congress intended that specific actions were to be tried in a federal court," the reading which the plaintiffs give to the sections in question would make district courts the final arbiters of the constitutionality of federal statutes. *Thermtron*, 423 U.S. at 355. (Emphasis in original).

If we interpret constitutionality rulings as falling within the subject matter jurisdictional determination to be made pursuant to section 1447(c), a district court order refusing remand and sustaining the constitutionality of the statute authorizing removal could be reviewed under 28 U.S.C. § 1291 or under the permissive appeal provisions of 28 U.S.C. § 1292(b). If, however, a district court were to find the statute authorizing removal to be unconstitutional and would enter an order of remand based upon lack of subject matter jurisdiction, its decision with regard to the constitutionality of a statute could *never* be reviewed. Each district court would thus be free to reach its own conclusions regarding the constitutionality of statutes authorizing removal. Thus inconsistent results would be completely insulated from review; the party asserting federal jurisdiction and defending the constitutionality of the statute would never be able to secure appellate review of a district court's determination of unconstitutionality.

It is inconceivable to us that Congress intended that a party be entitled to review of a district court's order remanding a case to the state courts on the ground that its own docket is overcrowded,

or on the ground that a contractual provision is valid and enforceable, but be unable to challenge a district court ruling that the statute which specifically provides for federal jurisdiction is unconstitutional. Reading sections 1447(c) and 1447(d) so broadly as to mandate this result assaults the orderly review process of the federal courts which Congress established so long ago.

In support of this broad reading of the subject matter jurisdiction inquiry under section 1447(c), the plaintiffs cite as authority a single sentence from the two paragraph *per curiam* opinion in *Richards v. Federated Dep't Stores, Inc.*, 812 F.2d 211 (5th Cir. 1987): "The *Thermtron* court does not say that we cannot review orders purporting to remand on this basis on certain grounds, or for certain faults; for constitutional infirmities, but not for statutory ones; it says that we cannot review them *at all*." (Emphasis in original.) The Supreme Court in *Thermtron*, of course, did not address the question presented here and said nothing whatever concerning the application of the section 1447(d) bar to remand orders resting on constitutional determinations.

The recognized exceptions to section 1447(d) and the policy underlying that section establish that the subject matter jurisdictional inquiry contemplated by section 1447(c) is limited to the question of whether Congress intended that the types of actions at issue be subject to removal. The question before us is not whether Congress intended that public liability actions be subject to removal but whether the Constitution requires that the clear removal provisions in the Amendments Act be invalidated. To hold that district court decisions with respect to such questions are



unreviewable would have serious jurisprudential consequences.

Should we find, as the plaintiffs would have us do, that constitutional determinations of the type made here fall within the purview of sections 1447(c) and 1447(d), district courts facing difficult issues on which guidance might be critical could find themselves constrained to uphold the constitutionality of a federal statute in order to preserve the possibility of appellate review. Such extraneous considerations were never intended to influence judicial decisionmaking.

The district court in this case struggled with the section 1447(d) bar to appellate review and how the court might best position the issues to be decided in order to insure the availability of review. Noting that the Supreme Court had yet to address specifically the question of whether appellate review of remand orders issued pursuant to section 1447(c) could be obtained through certification under section 1292(b), the district court held that certification was warranted.

[P]erhaps the most compelling [reason] for considering the issue at bar a controlling question of law is because the constitutionality of an Act of Congress is being challenged. The final determination on this issue will impact not only the parties in the instant cases but also the parties to any similar cases that may arise in the future. This jurisdictional issue requires more than a simple determination of whether public liability actions "arise under" the Act. See Herrmann, *Thermtron Revisited: When and How Federal Trial Court Remand Orders are Reviewable*, 19 Ariz. St. L.J., 395, 414 & n.10 (1987-88). Rather, it involves a determination as



to whether the grant of "arising under" jurisdiction itself is constitutional. Certainly, the issue is "serious to the conduct of the litigation, [both] practically [and] legally." *Katz*, 496 F.2d at 755.

*In re TMI Coordinated Proceedings*, 735 F. Supp. 640, 647 (M.D. Pa. 1990). Also important from our point of view is the district court's belief that:

there is a substantial ground for difference of opinion as to the correctness of its decision. The defendants and the United States presented strong and logical arguments for upholding the Act's jurisdictional grant. This court is not so bold as to state that its opinion on the constitutionality of an Act of Congress not previously reviewed by the courts is so plainly correct that it should not be reviewed by the appellate court.

*Id.* at 648.

We do not believe that Congress, in enacting sections 1447(c) and 1447(d), intended to leave the district court and the litigants in the quandary created by the procedural posture of this case. We cannot read section 1447(d) to bar appellate review of a district court's decision that the statute which purports to confer federal jurisdiction is constitutional, where the district court, recognizing the complexity and magnitude of the constitutional question before it, certifies that question for immediate appeal pursuant to 28 U.S.C. § 1292(b).

We emphasize that our conclusion is a narrow one and should in no way frustrate the policy underlying section 1447(d). "[Our view] respects Congress' decision to avoid the delay that would be caused by review of the bulk of remand orders,

but restricts that limitation to the category of cases where review is least necessary." Herrmann, *supra* at 415.

We are presented here with a situation where the delay and disruption of on-going state proceedings normally associated with orders of remand are not factors. Where the district court, in order to maximize the opportunity for appellate review, has stayed the order of remand, there is no interference with the expenditure of state judicial resources.<sup>9</sup>

The district court specifically addressed the policy underlying the section 1447(d) bar to review of remand orders and concluded that delay and disruption in the resolution of this matter might best be minimized by permitting rather than precluding appellate review:

If the court's determination that the Act's grant of jurisdiction exceeds the scope of article III is reviewed and found to be erroneous, the cases at bar will be tried in this court and the harm to defendants of denying them the right granted by Congress to be in federal court will be avoided. Review of this issue may also save the parties time and money. Although the decision reached by the court of appeals most likely will result in a petition for writ of certiorari to the Supreme Court, if the result of all review of this

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9. In recognizing that the policy concerns underlying section 1447(d) are not compromised where a stay has been entered, we do not suggest that the exception to the section 1447(d) bar which we articulate here has no application in cases where remand orders have not been stayed. The policy implications stemming from the procedural posture of other appeals involving constitutionality rulings and section 1447(d) must be evaluated on a case-by-case basis.

issue places the cases back in this court for trial, the termination of the litigation will be in sight. If this issue is not reviewed, however, given the history of these cases following the decisions in *Stibltz v. General Pub. Utils. Corp.*, 746 F.2d 993 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985), . . . and *Kitck v. Metropolitan Edison Co.*, 784 F.2d 490 (3d Cir. 1986), and defendants' strong desire to be in federal court, it is highly likely that there will be another amendment to the Price-Anderson Act to provide for federal jurisdiction over these cases. That undoubtedly would result in another battle for remand which would involve great expenditures of time and money.

735 F. Supp. at 647 (footnote and citations omitted). The district court also noted that:

[I]n this regard . . . review of the issue will not necessarily defeat the goal of § 1447(d) to prevent delay in the trial of remanded cases . . . . [T]he history of these cases gives every indication that there will be further delay in the trial of these cases despite remand to state court.

*Id.* at n.6.

In sum, we are convinced that Congress could not have intended that sections 1447(c) and 1447(d) be construed so broadly as to prevent our consideration of a section 1292(b) appeal which certifies an unsettled question of constitutional proportion. Such constitutional determinations could not have been intended by Congress to fall within the category of routine subject matter jurisdiction determinations contemplated by section 1447(c) and, consequently, are not immune

from review under section 1447(d).<sup>10</sup> We believe, therefore, that we have jurisdiction, pursuant to 28 U.S.C. § 1292(b), to hear this appeal.<sup>11</sup> This holding is derived from and is fully consistent with the holding of *Thermtron*: under section 1447(d), Congress "made the district courts the *final* arbiters of [only] *whether Congress intended* that specific actions were to be tried in a federal court."

423 U.S. at 355 (Rehnquist, J. dissenting) (latter emphasis added).

Having determined that we have jurisdiction to hear this appeal, we turn to the substance of the question certified.

We believe that the constitutional issue of whether these cases "arise under" the laws of the United States is at the core of these proceedings and will

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10. We are not swayed from this view by the plaintiffs' argument that because Congress did not set forth a specific exception to section 1447(d) in the Amendments Act which would permit appellate review of all remand orders in cases arising under the statute, *no* remand order may be reviewable. While we recognize that Congress may specifically exempt all remand orders resulting from interpretation of a particular statute, see The Financial Institutions Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1819(b)(2)(C), the fact that Congress chose not to exempt all such orders arising from removal under the Amendments Act is not dispositive. As well, the fact that some remand orders with origins in the Amendments Act would fall within the bar of section 1447(d) does not alter our view that the remand order in this case, based as it was upon the determination that Congress lacked the power to confer federal jurisdiction over public liability actions, is amenable to review.

11. Thus we need not reach the question of whether appeal would have been proper under 12 U.S.C. § 1291 or whether this would have been an appropriate case for issuance of a writ of mandamus pursuant to 28 U.S.C. § 1651.

thus focus upon the history and content of the comprehensive statutory scheme of which the Amendments Act is a part. We begin with the critical constitutional provision and the caselaw which defines it.

### III.

Article III, § 2, cl. 1 of the United States Constitution provides that:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . .<sup>12</sup>

"Congress cannot confer upon the lower federal courts a jurisdiction beyond the cases to which the

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12. The federal statute which authorizes district courts to hear cases involving federal questions also incorporates an "arising under" requirement. See 28 U.S.C. § 1331. The scope of "arising under" jurisdiction is different from and broader than the federal question inquiry under section 1331. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 496 (1983). See also *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 807 (1986), where the Court wrote that "[a]lthough the constitutional meaning of 'arising under' may extend to all cases in which a federal question is 'an ingredient' of the action, . . . we have long construed the statutory grant of federal-question jurisdiction as conferring a more limited power." Most of the caselaw which does address the "arising under" concept has been developed in the statutory context and is, therefore, not necessarily dispositive here. Although it is clear that Article III and Section 1331 are not co-extensive, we have not been directed to a single case which discusses the substantive difference in the "arising under" requirements of section 1331 and Article III. The outer parameters of Article III are largely unexplored.

judicial power of the United States extends under Art. III. . . .” *International Brotherhood of Teamsters v. W.L. Mead, Inc.*, 230 F.2d 576, 579 (1st Cir. 1956). See also *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983) (“... Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution”). In order, then, for Congress to confer a valid grant of federal jurisdiction, the cause of action must be one which “arises under” the laws of the United States.

The starting point of any discussion of the scope of Article III “arising under” jurisdiction must certainly be *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824). In *Osborn* the Court explored the constitutional reach of “arising under” jurisdiction in evaluating a statute which granted federal jurisdiction over *all* cases — including those filed pursuant to state law — to which the Bank of the United States was a party. The facts of *Osborn* are straightforward. The Bank of the United States, a federally created entity, filed suit in a federal court to enjoin the State of Ohio from levying a tax on the Bank. The Supreme Court held that the congressional act creating the Bank, granting it powers and authorizing it “to sue and be sued in any circuit court of the United States,” was sufficient to confer Article III “arising under” jurisdiction. Congress may properly extend “arising under” jurisdiction to any case in which a federal issue “forms an ingredient of the original cause.” 22 U.S. at 823. The Court found such an ingredient in the provision of the Act which, in incorporating the Bank, granted it the right to sue and be sued. “Every act of the Bank grows out of this law and is tested by it. To use the language



of the Constitution, every act of the bank arises out of this law." *Id.* at 827. The Court then formulated a test to be applied in determining whether "arising under" jurisdiction has been established:

If it be a sufficient foundation for jurisdiction, that the time or right set up by the party, may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction.

*Id.* at 822. The central teaching of *Osborn*, therefore, is that a case cannot be said to arise under a federal statute where that statute is nothing more than a jurisdictional grant. In order to confer "arising under" jurisdiction, "the act [may] not stop with incorporating the Bank;" it must do more. *Id.* at 826-27.

The broad holding of *Osborn* was clarified in *Verlinden*, 461 U.S. at 480, where the Court addressed a constitutional challenge to the Federal Sovereign Immunities Act. There the Court was required to determine "whether Congress exceeded the scope of Art. III of the Constitution by granting federal courts subject-matter jurisdiction over certain civil actions by foreign plaintiffs against foreign sovereigns *where the rule of decision may be provided by state law.*" *Id.* at 491 (emphasis added). In concluding that the "arising under" clause of Article III "provide[d] an appropriate basis for the statutory grant of subject-matter jurisdiction" the Court referred to the test



formulated in *Osborn* and stated that "*Osborn* . . . reflects a broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law." *Id.* at 492. The Court in *Verlinden* found it unnecessary to fix the precise limits of Article III because the Federal Sovereign Immunities Act contained a comprehensive set of legal standards to be applied to claims of immunity. The statute codified the rule that a foreign state was generally immune from suit, subject to specific exceptions. The existence of these exceptions was said to have "inject[ed] an essential federal element into all suits brought against foreign states." *Id.* at 484. The Court observed that while, "taken at its broadest, *Osborn* might be read as permitting 'assertion of original federal jurisdiction on the remote possibility of presentation of a federal question,'" the case before it in *Verlinden* involved more than a "speculative possibility" that a federal question would arise. 480 U.S. at 492.

At the threshold of every action in a district court against a foreign state, . . . the court must satisfy itself that one of the exceptions [to sovereign immunity] applies — and in doing so it must apply the detailed federal law standards set forth in the Act. Accordingly, an action against a foreign sovereign arises under federal law, for purposes of Art[icle] III jurisdiction.

*Id.* at 493-94.

In so holding, the Court reaffirmed the *Osborn* rule that a statute which merely confers federal jurisdiction cannot constitute the federal law

under which an action arises. *Id.* at 496. The Court concluded, however, that where jurisdictional provisions of an Act constitute one part of a comprehensive scheme and do not "merely concern access to the federal courts," there is no constitutional infirmity. *Id.* With respect to the constitutionality of the Foreign Sovereign Immunities Act, the Court stated:

Congress, pursuant to its unquestioned Article I powers, has enacted a broad statutory framework governing assertions of foreign sovereign immunity. In so doing, Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 States. . . . [E]very action against a foreign sovereign necessarily involves application of a body of substantive federal law. . . .

*Id.* at 497. We take from *Verlinden* the proposition that where Congress has the authority to legislate in a given area and substantively does so, a grant of federal subject matter jurisdiction will survive an Article III challenge.

The fact that pure jurisdictional statutes cannot withstand scrutiny under Article III was reiterated recently in *Mesa v. California*, 489 U.S. 121 (1989). There the Court determined that the federal officer removal statute, 28 U.S.C. § 1442(a), required the averment of a federal defense.<sup>13</sup> The contrary view,

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13. 28 U.S.C. § 1442(a) provides, in pertinent part that:

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing

*i.e.*, reading section 1442(a) so broadly as to confer jurisdiction with no allegation of a federal defense,

raises serious doubts whether, in enacting § 1442(a), Congress would not have "expand[ed] the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983). In *Verlinden*, we discussed the distinction between "jurisdictional statutes" and "the federal law under which [an] action arises, for Art. III purposes," and recognized that pure jurisdictional statutes which seek "to do nothing more than grant jurisdiction over a particular class of cases" cannot support Art. III "arising under" jurisdiction. . . . Section 1442(a), in our view, is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant. Section 1442(a), therefore, cannot independently support Art. III "arising under" jurisdiction.

*Id.* at 136.<sup>14</sup>

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the place wherein it is pending: (1) Any officer of the United States . . . for any act under color of such office . . . .

14. The Supreme Court has, in the past, "rejected congressional attempts to confer jurisdiction on federal courts simply by enacting jurisdictional statutes." *Verlinden*, 461 U.S. at 495-96. See *Mossman v. Higginson*, U.S. 4 (Dall.) 12 (1800) (statute granting federal jurisdiction over actions in which "an alien is a party" would exceed the scope of Article III if interpreted to permit an action between two aliens); and *The Propeller Genessee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 451-53 (1852) (court upheld statute granting maritime jurisdiction over vessels on the Great Lakes as an exercise of maritime jurisdiction but held that the statute alone could not support "arising under" jurisdiction).

The district court carefully applied these precedents and concluded that Congress exceeded the scope of Article III in enacting the Amendments Act because the Amendments Act, like the federal officer removal statute, was purely jurisdictional, creating only a federal forum for the litigation of public liability actions.<sup>15</sup>

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15. The district court found that the Amendments Act was deficient under the holdings of *Verlinden* and *Osborn*:

[T]he Act does not satisfy the standard set forth in *Osborn*; here, "the right . . . set up by the party [will not] be defeated by one construction of the . . . law . . . and sustained by the opposite construction." *Osborn*, 22 U.S. (9 Wheat) at 822. In *Osborn*, . . . [the federal Bank] chartering act . . . provided the cause of action and that cause of action could be defeated depending upon construction of the federal law. Similarly, in *Verlinden*, . . . [i]n cases brought pursuant to . . . [the Foreign Sovereign Immunities Act], if a court determined that none of the exceptions to sovereign immunity embodied in the federal standard were applicable, "the plaintiff [would] be barred from raising his claim in *any* court in the United States." *Verlinden*, 461 U.S. at 497 (emphasis added). Here, the right at issue is the right to bring an action for recovery of damages for alleged tortious injuries resulting from nuclear incidents. That right is created by state law and exists regardless of the provisions of the Act. Differing constructions of the Act would only affect the forum in which such an action is maintained. For example, if a federal court determined that a case did not qualify as a "public liability action," the case still could be brought in state court. The state court would apply the same substantive law that the federal court would have applied. The only difference would be the forum in which the case was tried. Quite simply, the right at issue here is not susceptible to defeat by differing constructions of the Act.

*Id.* (citations and footnote omitted).

Critical to the district court's constitutionality determination was the fact that the rules of decision for public liability actions filed in or removed to a federal court are, according to the Amendments Act, to be "derived from the law of the State in which the nuclear incident . . . occurs." 42 U.S.C. § 2014(hh). Because principles of state law were to be applied, the district court found that Congress had not "codif[ie]d the standards' governing personal injury actions resulting from nuclear incidents 'as an aspect of substantive federal law.'" 735 F. Supp. at 644 (quoting *Verlinden*, 461 U.S. at 497). The district court concluded that Congress had not set forth a comprehensive codified standard to be applied in all public liability actions, but instead had relied upon standards developed by the states. The "arising under" requirement of Article III, section 2 of the United States Constitution had not, therefore, been satisfied and the Amendments Act was constitutionally infirm.

Recognizing that there was "a substantial ground for difference of opinion as to the correctness of the decision," the district court concluded that the grant of "arising under" jurisdiction set forth in the Amendments Act was unconstitutional. Our resolution of the question certified depends entirely upon the accuracy of the district court's characterization of the Amendments Act as purely jurisdictional. We turn, therefore, to the Act itself and begin with its history.

#### IV.

Congressional regulation of the nuclear power industry was initiated with the enactment of the Atomic Energy Act of 1946. While that statute

reflected Congress' determination that the nuclear industry would be a government monopoly, see Act of Aug. 1, 1946, ch. 724, 60 Stat. 755, Congress later concluded that it would be in the national interest to permit private sector involvement in that industry under a system of federal licensing and regulation. This policy decision was implemented in the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011-2296. The private actors entering the nuclear power industry were still required to confront the risks associated with potentially devastating liability which might be imposed in the event of a major nuclear accident. "[W]hile repeatedly stressing that the risk of a major nuclear accident was extremely remote, spokesmen for the private sector informed Congress that they would be forced to withdraw from the field if their liability were not limited by appropriate legislation." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 64 (1978).<sup>16</sup>

In 1957, Congress enacted the Price-Anderson Act for the purpose of "protect[ing] the public and . . . encourag[ing] the development of the atomic energy industry." 42 U.S.C. § 2012. This Act contained three central elements. First, the Act set a ceiling on the aggregate liability which could be imposed upon those engaged in the use and handling of radioactive material "either through contract with the Federal Government or under a license issued by the Federal Government for the private development of such activities." S. Rep. No. 218, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 1476, 1477.

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16. The background of the Price-Anderson Act, and consequently of the Amendments Act, is set forth in *Duke Power*, 438 U.S. at 63-67.



The second important feature of the Act involved the "channeling of liability." Under this provision, any entity exposed to potential liability for activity resulting in a nuclear incident, even if it were not a direct participant in the activity, was entitled to indemnification. *Id.*

Finally the Price-Anderson Act established that all public liability claims above the amount of required private insurance "protection would be indemnified by the Federal Government, up to the aggregate limit on liability." *Id.*

In 1966, prior to the scheduled expiration of the Price-Anderson Act, the liability limitation portions of the Act were extended for an additional ten years and a new provision was added which required that those indemnified waive the defenses of negligence, contributory negligence, charitable or governmental immunity, and assumption of the risk in the event of an action arising as the result of an extraordinary nuclear occurrence. 42 U.S.C. § 2210(n)(1).<sup>17</sup> The 1966 Amendments also provided for the transfer, to a federal district court, of all claims arising out of an extraordinary nuclear occurrence. 42 U.S.C. § 2210(n)(2). These provisions grew out of

congressional concern that state tort law dealing with liability for nuclear incidents was generally unsettled and that some way of insuring a

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17. An extraordinary nuclear occurrence was defined as "any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the . . . Commission . . . determines to be substantial, and which the . . . Commission determines has resulted or probably will result in substantial damages to persons offsite or property offsite. . . ." 42 U.S.C. § 2014(j).



common standard of responsibility for all jurisdictions — strict liability — was needed. A waiver of defenses was thought to be the preferable approach since it entailed less interference with state tort law than would the enactment of a federal statute prescribing strict liability. See S. Rep. No. 1605, 84th Cong., 2d Sess., 6-10 (1966).

*Duke Power*, 438 U.S. at 65-66 (footnote omitted).

In 1975, the Price-Anderson Act was amended a second time. These amendments extended the Act's coverage and made certain liability limitation adjustments. Provision was made to phrase out the federal indemnity portion of the Price-Anderson scheme.

On August 29, 1988, Congress amended the Price-Anderson Act for a third time, enacting the Price-Anderson Amendments Act of 1988. The decision to amend and to extend the Price-Anderson Act grew out of the congressional conclusion that

The Price-Anderson System, including the waiver of defenses provisions, the omnibus coverage, and the predetermined sources of funding, provides persons seeking compensation for injuries as a result of a nuclear incident with significant advantages over the procedures and standards for recovery that might otherwise be applicable under State tort law. The Act also provides a mechanism whereby the federal government can continue to encourage private sector participation in the beneficial uses of nuclear materials.

S. Rep. No. 218, 100th Cong., 2d Sess. 4, *reprinted* in 1988 U.S. Code Cong. & Admin. News 1476,

1479. The Amendments Act extended the authority for the Price-Anderson indemnification system, increased the aggregate level of indemnification payments, established a mechanism for expedited congressional action relating to additional compensation, and altered the breadth of the compensation system to cover activity related to disposal of nuclear waste. See S. Rep. No. 70, 100th Cong., 2d Sess. 1, *reprinted in* 1988 U.S. Code Cong. & Admin. News 1424. The Amendments Act also contained provisions imposing criminal and civil penalties upon contractors who violate Department of Energy rules, regulations or orders respecting nuclear safety and creating an independent panel to advise Congress regarding the appropriate means of fully compensating nuclear accident victims was created. Two provisions of the Amendments Act are critical to the appeals now before us. In addition to the provisions already detailed, the Amendments Act included an expansion of the reach of section 2210(n)(2) to provide for removal of, and original federal jurisdiction over, claims arising from any "nuclear incident."<sup>18</sup> Section 2210(n)(2) was amended to read as follows:

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18. Prior to the Amendments Act, the grant of federal jurisdiction and rights of removal were available only in actions resulting from an extraordinary nuclear occurrence. The decision to expand the jurisdictional grant was based upon the fact that "[t]he experience with claims following the TMI accident demonstrate[d] the advantages of the ability to consolidate claims after the nuclear incident. Attorneys representing both plaintiffs and defendants in the TMI litigation testified . . . that the ability to consolidate claims in federal court would greatly benefit the process for determining compensation for claimants . . . . The availability of the provisions for consolidation of claims in the event of

With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission, or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on [the date of the enactment of the Price-Anderson Amendments Act of 1988] ) or United States district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States. . . .

42 U.S.C. § 2210(n)(2).

Also important to this appeal is the Amendment Act's addition of section 2014(hh) to the definition section of the Price-Anderson Act. Section 2014(hh) defines a public liability action as "any suit asserting public liability"<sup>19</sup> and also contains

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any nuclear incident . . . would avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions that may occur in the absence of consolidation." S. Rep. No. 218, 100th Cong., 2d Sess. 13, reprinted in 1988 U.S. Code Cong. & Admin. News 1476, 1488.

19. Public liability, a concept unchanged by the Amendments Act, was defined in the Price Anderson Act as "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation . . . ." 42 U.S.C. § 2014(w).

the provision upon which this constitutional debate centers:

A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

42 U.S.C. § 2014(hh). It was these two Amendment Act provisions which formed the basis for the district court's conclusion that the Act could not withstand constitutional scrutiny.

In addition, we note that following the 1988 Amendments, the Price-Anderson Act contained provisions which created a federal cause of action, 42 U.S.C. § 2014(hh); set a limitations period to govern the newly-created cause of action, 42 U.S.C. § 2210(n)(1); provided for venue, 42 U.S.C. § 2210(n)(2); provided for choice of law, 42 U.S.C. § 2014(hh); placed limits on the availability of punitive damages, 42 U.S.C. § 2210(s); channeled liability to licensees, 42 U.S.C. § 2014(t); adopted a rule of industry-share liability, 42 U.S.C. § 2210(b); mandated that normally-available defenses be waived in the cases of an extraordinary nuclear occurrence, 42 U.S.C. § 2210(n)(1); and established an upper limit of aggregate liability, 42 U.S.C. § 2210(e).

## V.

It is clear that "cases in which federal and state law elements are mixed present very difficult subject matter jurisdiction problems for the federal court." Hirshman, *Whose Law Is It, Anyway?* A

*Reconsideration of Federal Question Jurisdiction Over Cases of Mixed State and Federal Law*, 60 Ind. L. J. 17 (1984). The same is no less true of the "arising under" determination to be made in construing Article III. See Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction and the Revision of the Judicial Code*, 65 B.U. L. Rev. 205, 265 n.195 (1985) (the scope of federal question jurisdiction granted by Article III "has long perplexed even the most eminent of jurists and scholars"). These difficulties arise because "Congress rarely enacts a complete and self-sufficient body of federal law. The federal statutes are full of references, both explicit and implicit, to the law of some state. As a result, legal problems repeatedly fail to come wrapped up in neat packages marked "'all federal' or 'all state.'" Hirshman, *supra* at 18.

The Amendments Act is no exception. It, too, contains both federal and state elements. While the public liability cause of action itself and certain elements of the recovery scheme are federal, the underlying rules of decision are to be derived from state law. This is not fatal to "arising under" jurisdiction because we find that Congress intended to — and did — create a federal cause of action which will implicate substantive aspects of federal law.

Under the terms of the Amendments Act, the "public liability action" encompasses "any legal liability" of any "person who *may* be liable" on account of a nuclear incident. 42 U.S.C. § 2014(hh) (emphasis added). Given the breadth of this definition, the consequence of a determination that a particular plaintiff has failed to state a public liability claim potentially compensable under the Price-Anderson Act is that he has no

such claim at all. After the Amendments Act, no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all*. Any conceivable state tort action which might remain available to a plaintiff following the determination that his claim could not qualify as a public liability action, would not be one based on "any legal liability" of "any person who may be liable on account of a nuclear incident." It would be some other species of tort altogether, and the fact that the state courts might recognize such a tort has no relevance to the Price-Anderson scheme. At the threshold of every action asserting liability growing out of a nuclear incident, then, there is a federal definitional matter to be resolved: Is this a public liability action? If the answer to that question is "yes," the provisions of the Price-Anderson Act apply; there can be no action for injuries caused by the release of radiation from federally licensed nuclear power plants separate and apart from the federal public liability action created by the Amendments Act.

The district court's narrow interpretation of the Amendments Act was founded, not upon an analysis of congressional intent, but upon its concern that because Congress directed that the rules of decision governing public liability actions were to be derived from state law, Congress had failed to rule substantively and thus had exceeded the established boundaries of Article III. We do not find any support in the caselaw for the proposition that Congress may not constitutionally rely upon state rules of decision as a foundation for a particular statutory scheme. Congress has, at



various times and in various contexts, enacted statutes authorizing federal courts to decide nondiversity cases turning on state law rules of decision. Note, *Over-Protective Jurisdiction?: A State Sovereignty Theory of Federal Questions*, 102 Harv. L. Rev. 1948, 1950 (1989) (footnote omitted). Examples of statutory schemes adopting state rules of decision include the Federal Deposit Insurance Act, 12 U.S.C. § 1819 (1950); the Bankruptcy Reform Act of 1978, 92 Stat. 2549 (1978); 11 U.S.C. §§ 101-151.326 (1978); 16 U.S.C. § 457 (1982) (subjecting claims of wrongful death within a federal enclave to federal jurisdiction); the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.*; and the Federal Tort Claims Act, 28 U.S.C. § 1346(b). In these statutes, as in the Amendments Act, Congress relied upon state law as a foundation and effectuated its purposes by creating an overlay of federal law.

At other times Congress has not been explicit as to the role which state law is to play in a particular statutory scheme. Courts, in that circumstance, have been required to determine whether state law was intended to operate as state law or whether state law should be read to form the content of new federal law, filling interstitial statutory gaps. Courts evaluating these mixed state/federal schemes have focused primarily upon congressional intent and have formulated decisions accordingly. See, e.g., *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204 (1946) (congressional intent underlying the Reconstruction Finance Corporation Act supported reliance on state law definitions of "real property" for tax purposes); *United States v. Little Lake Misere Land Co., Inc.*, 412 U.S. 580 (1973) (Court



refused to apply state law as the rule of decision under the Migratory Bird Conservation Act). See also *Textile Workers Union of Am. v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957) (sustaining jurisdictional grant of section 301 of the Labor Management Relations Act as impliedly directing that state law be absorbed as federal law). These cases demonstrate that courts, in order to honor the presumption in favor of a statute's constitutionality, may be required to adopt a flexible approach to a particular state/federal mix.

In this case, congressional intent is not an issue. In explicitly providing that the "substantive rules for decision" in public liability actions "shall be derived from" the law of the state in which the nuclear incident occurred, we believe that Congress expressed its intention that state law provides the content of and operates as federal law. The legislative history of the Amendments Act supports this view by clarifying that Congress adopted the approach to state law embodied in the Outer Continental Shelf Lands Act. Reporting on H.R. 1414, the House version of the Amendments Act, the Committee on Interior and Insular Affairs made specific reference to the Lands Act:

The Committee recognizes, of course, that Article III of the Constitution limits the type of cases that federal courts created under the Article may hear. For this reason, H.R. 1414 expressly states that any suit asserting public liability shall be deemed to be an action arising under the Price-Anderson Act, thereby making suits asserting public liability "Cases . . . arising under . . . the laws of United States" within the meaning of Article III. Rather than designing a new body of substantive law to govern such

cases, however, the bill provides that the substantive rules for decision in such actions shall be derived from the law of the state in which the nuclear incident involved occurs, unless such law is inconsistent with the Price-Anderson Act. The Committee believes that conferring on the Federal courts jurisdiction over claims arising out of all nuclear incidents in this manner is within the constitutional authority of Congress and notes that the Congress has used this approach in the Outer Continental Shelf Lands Act.

H.R. Rep. No. 104, 100th Cong., 1st Sess., Pt. 1, at 18 (1987).

In the Lands Act, Congress declared "the civil and criminal laws of each adjacent state to be the law of the United States" on the Outer Continental Shelf "[t]o the extent that they are applicable and not inconsistent with" the Lands Act. 43 U.S.C. § 1333(a)(2). Congress also provided that the district courts would have "jurisdiction of cases and controversies arising out of, or in connection with . . . any operation conducted on the outer Continental Shelf. . . ." 43 U.S.C. § 1349(b)(1).

While the Lands Act has been the subject of frequent litigation, the power of Congress to confer federal jurisdiction in these cases and to give content to the federal law by adopting state rules of decision has never been questioned. See *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 357 (1969) (the Lands Act provided for exclusive regulation by federal law with state law adopted as surrogate federal law); *Tidelands Royalty "B" Corp. v. Gulf Oil Corp.*, 804 F.2d 1344, 1347 n.1 (5th Cir. 1986) (district court had

jurisdiction over claim involving mineral lessee's rights under state law); *Laredo Offshore Constructors, Inc. v. Hunt Oil Co.*, 754 F.2d 1223, 1225 (5th Cir. 1985) (district court had subject matter jurisdiction over a contract dispute governed by state law rules; *Hughes v. Lister Diesels, Inc.*, 642 F. Supp. 233 (E.D. La. 1986) (district court had subject matter jurisdiction to resolve personal injury action governed by state law rules).

We recognize that the language respecting state law in the Amendments Act is not identical to that of the Lands Act. While the Lands Act provides that the laws of adjacent states are "to be the law of the United States" on the outer continental shelf, the Amendments Act refers to substantive rules for decision as "derived from state law." We believe that the language adopted in the Amendments Act supports our view that Congress intended that the rules of decision constitute federal law.

Even if we were to find that it is state law itself, rather than state law operating as federal law, which forms the basis for decision in public liability actions, our conclusion regarding congressional authority to confer federal jurisdiction over these public liability actions would be unaffected. In *Verlinden*, the very issue to be decided was whether Congress had authority to grant jurisdiction to the federal courts over causes of action when those actions were governed by pure state law rules of decision. The Foreign Sovereign Immunities Act did not, as does the Amendments Act, affect substantive state tort law. The sole objective of the Immunities Act was to specify those instances in which sovereign

immunity would and would not apply. This federal element was sufficient to allow the Foreign Sovereign Immunities Act to withstand an Article III challenge in spite of the fact that all substantive issues were to be resolved in accordance with state law.

The federal elements involved in the Price-Anderson scheme are similarly sufficient. The federal ingredients here are as substantial as those in *Verlinden* and are more substantial than those found sufficient in *Osborn*. The Amendments Act creates a federal cause of action which did not exist prior to the Act, establishes federal jurisdiction for that cause of action, and channels all legal liability to the federal courts through that cause of action. By creating this federal program which requires the application of federal law, Congress sought to effect uniformity, equity, and efficiency in the disposition of public liability claims. With the federal jurisdiction and removal provisions set forth in the Amendments Act, Congress ensured that all claims resulting from a given nuclear incident would be governed by the same law, provided for the coordination of all phases of litigation and the orderly distribution of funds, and assured the preservation of sufficient funds for victims whose injuries may not become manifest until long after the incident. See H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 3, at 18 (1987). Thus, Congress clearly intended to supplant all possible state causes of action when the factual pre-requisites of the statute are met.

Examining the Price-Anderson scheme as completed by the Amendments Act, we are convinced that the Act, while relying for definition upon state law elements, contains the federal components necessary to survive the constitutional

challenge mounted here. Our conclusion is unaffected by those pre-Amendments Act cases in which we determined that the Price-Anderson Act did not create a federal cause of action. Those cases, which evaluated the statutory rather than the constitutional "arising under" requirement, rested principally on the finding that Congress had not specifically created a federal tort and did not intend to create a federal cause of action. *See, e.g., Kllick v. Metropolitan Edison Co.*, 784 F.2d at 490, (legislative history of Price-Anderson Act replete with indications that Congress never intended to displace state tort law with respect to the issues of liability and recoverable damages for nuclear accidents); *Stibitz v. General Pub. Util. Corp.*, 746 F.2d at 993 (legislative history of the Price-Anderson Act belies any contention that Congress intended to create federal common law causes of action) and *Commonwealth of Pennsylvania v. General Pub. Util. Corp.*, 710 F.2d 117, 122 (3d Cir. 1983) (nothing in statute or legislative history which would warrant adoption and application of undeveloped federal common law).

With the Amendments Act, however, the entire Price-Anderson landscape was transformed. Congress clearly considered the decisions of our court holding that Congress had not intended to create a federal cause of action for cases not based upon an extraordinary nuclear occurrence, that federal question jurisdiction would attach to actions resulting from an extraordinary nuclear occurrence, that federal questions would arise in the defense of nuclear accident claims but would not appear in the plaintiff's case, and that Congress had not directed that a body of federal

common law be created. Congress then provided, in the Amendments Act, the clearest expression of intent that there be a federal cause of action arising directly under the Act. Despite the plaintiffs' arguments to the contrary, *Kitck*, *Stibitz*, and the other pre-Amendments Act cases provide no support for the Article III challenge made here.<sup>20</sup>

We are also not persuaded by the plaintiffs' argument that the Amendments Act exceeds the scope of Article III because the public liability action, now a federal tort, was previously actionable under state law. Where Congress creates a right of action, and formulates substantive federal provision applicable to that action, the action arises under federal law despite the fact that the same wrong may previously have been actionable under state law. Were the rule otherwise, actions which today may be brought under the Federal Tort Claims Act, the Outer Continental Shelf Lands Act and other federal

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20. In fact, while the pre-Amendments Act cases conclude that Congress did not intend to create a federal cause of action, none of these cases so much as suggests that Congress lacked the *power* to do so. In *Kitck*, we concluded that had Congress intended to create a federal cause of action applicable to "nuclear incidents, the statutory grant of jurisdiction for extraordinary nuclear occurrences would have been superfluous. "This statutory grant of jurisdiction [pursuant to pre-amendment act section 2210(n)] would not have been necessary had Congress intended the Price-Anderson Act to 'replace' state tort law; instead, jurisdiction over all nuclear accidents, 'extraordinary' or not, *would have been available* under 28 U.S.C. §§ 1331 or 1337(a)." 784 F.2d at 494 (emphasis added). See also *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 240-41 (1984) (the federal government occupies the entire field of nuclear safety concerns).



statutes would not arise under federal law because, prior to enactment of the federal statute, actions based on the identical occurrence could have been brought in a state court. The federal nature of the right to be established is decisive. Here, the right to control the safety aspects of nuclear power is exclusively federal. Congress, therefore, is authorized to create a federal tort which may have had its origins in state law. The basis of the public liability action no longer stems from state law. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 240-41 (1984) (the federal government occupies the entire field of nuclear safety concerns).

Through the Amendments Act, Congress has placed an overlay of federal law upon the rights and remedies previously available under state law. Once a federal court is satisfied that a particular suit is a public liability action, additional questions under the Amendments Act may need to be addressed. Under certain circumstances licensees may be required to waive defenses which would have been viable under state law. Punitive damage awards available under state law also may be precluded. Furthermore, in every case alleging public liability, courts will be required to determine whether state law principles conflict with other parts of the Price-Anderson scheme.

Two Supreme Court cases indicate that the duty the defendants owe the plaintiffs in tort is dictated by federal law.<sup>21</sup> In *Pacific Gas & Electric Co. v.*

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21. The two district court cases on point hold that federal law does preempt state law. See *O'Conner v. Commonwealth Edison Co.*, 748 F. Supp. 672 (C.D. Ill. 1990) (certifying the question to the court of appeals). These cases are discussed *infra*.



*State Energy Conservation and Development Commission*, 461 U.S. 190 (1983), the Court considered the question of whether a California statute, which prohibited the construction of nuclear plants until technology for safe disposal of nuclear waste was developed, was preempted by federal law. *See id.* at 198. The Court held that preemption is found in three circumstances: where there is an explicit statement of preemption by Congress; where there is pervasive federal regulation in the field; and where state law "actually conflicts with federal law." *Id.* at 204.

With regard to nuclear energy, the Court found that "Congress . . . intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating . . . for determining questions of need, reliability, cost, and other related state concerns." *Id.* at 205. The Court concluded that "the safety of nuclear technology was the exclusive business of the Federal Government," *id.* at 208, and that Congress, by permitting the states to regulate "for purposes other than for protection against radiation hazards," *id.* at 210, reemphasized the state and federal governments' respective spheres. Accordingly,

the Federal Government maintains complete control of the safety and "nuclear" aspects of energy generation. . . .

State safety regulation is not pre-empted only when it conflicts with federal law. Rather, *the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States. When the Federal Government completely occupies a given*

*field ... as it has done here, the test of pre-emption is whether the "matter on which the State asserts the right to act is in any way regulated by the Federal Act."*

*Id.* at 212-13 (emphasis added) (citation omitted). The California statute was held to be not preempted because the Court found a "non-safety rationale" for its implementation.

The holding in *Pacific Gas & Electric* was reaffirmed one term later in *Silkwood*: "states are precluded from regulating the safety aspects of nuclear energy." 464 U.S. at 240-41. In *Silkwood*, a decedent's estate brought suit, based on state common law tort principles, against a manufacturer of plutonium. The Court of Appeals for the Eleventh Circuit affirmed a verdict in the plaintiff's favor for property damage, based on a strict liability theory, but reversed an award of punitive damages. In light of *Pacific Gas & Electric*, and the legislative history, the Court concluded:

If there were nothing more, this concern over the state's inability to formulate effective standards and the foreclosure of the States from conditioning the operation of nuclear power plants on compliance with state-imposed safety standards arguably would disallow resort to state-law remedies . . . .

*Id.* at 250-51. However, the Court found that there was a clear congressional intent to leave state remedies intact, "notwithstanding the NRC's exclusive regulatory authority." *Id.* at 254 (emphasis added).

In sum, it is clear that in enacting and amending the Price-Anderson Act, Congress

assumed that state-law remedies . . . were available . . . . This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is some tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. . . . It may be that the award of damages based on the state law of negligence . . . is regulatory in the sense that a nuclear plant will be threatened if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept.

We do not suggest that there could never be an instance in which the federal law would pre-empt the recovery of damages based on state law. . . . *preemption should . . . [be judged] on whether there is an irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law.*

*Id.* at 256 (emphasis added). The court found no conflict in *Silkwood*, because the award of punitive damages would not impede the congressional goal of promoting nuclear safety. See *id.* at 257. Permitting the states to apply their own nuclear regulatory standards, in the form of the duty owed by nuclear defendants in tort, would, however, "frustrate the objectives of the federal law."

Indeed, one court, when construing the source of the duty to be applied in a tort case arising under the Price-Anderson Act, concluded that the

NRC had extensively regulated the dose of radiation a worker could receive. See *O'Conner v. Commonwealth Edison Co.*, 748 F. Supp. 672 (C.D. Ill. 1990). Accordingly, the court held that if Illinois law did not adopt the federal standard "as the duty owed by the Defendants, this Court believes that Illinois law would be inconsistent with federal law and that federal law would take precedence." *Id.* at 678 (certifying that question for interlocutory appeal).

Similarly, in *Hennessy v. Commonwealth Edison Company*, No. 89-C-05928 (N.D. Ill. Apr. 26, 1991) (1991 WL 81189), a plaintiff sued for negligent infliction of emotional distress, strict liability, and battery arising out of radiation exposure he received while working for the defendant. The court concluded "that compliance with the federal permissible dose limits ... should conclusively establish that the applicable standard of care was met in this case." 1989 WL 81189 at 6 (relying on *Pacific Gas & Electric* and *O'Conner*).

Under *Pacific Gas & Electric Co.*, states are preempted from imposing a non-federal duty in tort, because any state duty would infringe upon pervasive federal regulation in the field of nuclear safety, and thus would conflict with federal law. See 461 U.S. at 204.<sup>22</sup> Consequently, the plaintiffs' rights will necessarily be determined, in part, by reference to federal law, namely the federal

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22. The result is the same regardless of whether the state adopts stricter or more lenient safety standards. If stricter safety standards are imposed, the state will create a disincentive to nuclear power that is in conflict with federal law. If more lenient standards are imposed, the state will undercut federal safety efforts.

statutes and regulations governing the safety and operation of nuclear facilities. Given that there are important federal questions to be resolved which are indispensable ingredients of the public liability action, we find that Congress did not exceed its constitutional authority in conferring federal jurisdiction over public liability actions.<sup>23</sup>

## VI.

Having concluded that the Amendments Act does not transgress the limits of Article III, we turn, finally, to the plaintiffs' collateral constitutional challenges to the Amendments Act. The plaintiffs urge, as alternate grounds for affirming the district court's order of remand, that application of the Amendments Act to cases already pending in a state court violates constitutional principles of federalism, state sovereignty, due process, and equal protection. "Our scope of review is generally governed by the controlling question of law set forth in the district court's certification order under 28 U.S.C. § 1292. Nevertheless, since we review orders and not isolated legal questions . . . we may consider all grounds that require reversal of the order." *Gruber v. Price Waterhouse*, 911 F.2d 960, 963 (3d Cir. 1990). The plaintiffs' arguments with respect to these issues were skeletal. As we

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23. The defendants have proposed an alternative basis for Article III analysis premised on the theory of "protective jurisdiction." "Under this theory, Congress may grant federal courts the power to hear nondiversity cases turning on state law as long as those cases bear some relation to a federal interest or to Congress' substantive lawmaking authority under Article I." *Over-Protective Jurisdiction supra*, 102 Harv. L. Rev. at 1953. Because we believe that the issue regarding constitutionality of the Amendments Act can be resolved without resort to this theory, we do not address it here.

find no merit to these collateral issues, our discussion is similarly painted with a broad brush.

The plaintiffs' sovereignty and federalism claims are based upon the proposition that a state court may not be ousted of its jurisdiction once that jurisdiction has been properly established. This simply is not an accurate statement of the law. In *Tennessee v. Davis*, 100 U.S. 256, 267 (1880), the Supreme Court, addressing the validity of the general removal statutes, wrote:

The removal of cases arising under [the laws of the United States] from State into Federal courts is, therefore, no invasion of State domain. On the contrary, a denial of the right of the general government to remove them, to take charge of and try any case arising under the Constitution or laws of the United States, is a denial of the conceded sovereignty of that government over a subject expressly committed to it.

*See also, Railway Co. v. Whitton's Administrator*, 80 U.S. 270 (1872) (Congress was authorized to extend removal rights to plaintiffs in diversity cases pending in state court even where defendants opposed removal); and *City of Greenwood v. Peacock*, 384 U.S. 808, 833 (1966) ("Congress is constitutionally fully free to establish the conditions under which civil or criminal proceedings involving federal issues may be removed from one court to another"). In *Pension Benefit Guarantee Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), the Court wrote:

Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain



within the exclusive province of the legislative and executive branches[.]

*Id.* at 729. Where there is a legitimate purpose for extending the provisions of the Amendments Act to pending cases, then, there is no encroachment upon state sovereignty.

The plaintiffs' remaining constitutional claims, those resting on due process and equal protection, also depend upon the legitimacy of Congress' purpose in structuring the Amendments Act to apply retroactively. We therefore focus once more upon the purposes underlying the Amendments Act and the Price-Anderson scheme.

The retroactivity feature of the Amendments Act was included to modify the previously limited reach of the Price-Anderson Act. *See* S. Rep. No. 218, 100th Cong., 1st Sess., at 13 (date). Retroactivity guaranteed that all cases arising out of the same nuclear incident could be consolidated in one forum. This consolidation provision was designed to promote "equitable and uniform treatment of victims," H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1, at 18, 29 (1987); "the orderly distribution of funds," H.R. Rep. 104, 100th Cong., 1st Sess., pt. 3, at 30 (1987); and "the avoidance of similar issues in multiple jurisdictions that may occur in the absence of consideration." S. Rep. No. 218, 100th Cong., 1st Sess. at 13 (1988). These purposes are not undermined by the congressional grant of concurrent jurisdiction. The Amendments Act ensures that every claim originating in a single nuclear incident may be considered with other similar claims. Where, as here, an incident results in multiple claims with cases filed in several



counties in several states, consolidation in federal court serves to reduce uncertainty, expenditure of resources in dealing with duplicative issues, and the possibility of inconsistent outcomes. Where, however, only one person is affected by the nuclear incident, as in *O'Connor*, No. 88-1272 (C.D. Ill. Sept. 26, 1990), or where all claims are filed in a single state court, resolution of the public liability action may efficiently be resolved absent removal.

Given the goals underlying the Amendments Act, we believe that its provision for retroactivity was rationally directed to a legitimate federal concern. As the plaintiffs have failed to meet the burden of showing that the Amendments Act was arbitrary and irrational in purpose and effect, we find no ground for holding the Amendments Act unconstitutional on any of the collateral grounds asserted. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

Our decision in this regard is consistent with precedent established in other courts of appeals. *See Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) (retroactivity of a statute does not make it unconstitutional as a legal claim affords no enforceable property right until reduced to final judgment); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 804 (11th Cir. 1989) (same); *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 990-91 (9th Cir. 1987), *cert. denied sub nom. Kontzeski v. Livermore Labs*, 485 U.S. 905 (1988) (plaintiff challenging retroactivity bears the burden of showing that legislature has acted in arbitrary and irrational way); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (there is no particular fundamental right to particular state law tort claims).

## VII.

Having concluded that we have a valid jurisdictional basis to hear this appeal and finding no constitutional infirmity in the Price-Anderson Amendments Act of 1988, we will vacate the order of the district court and remand this matter for further proceedings in the federal forum.

SCIRICA, *Circuit Judge*, concurring.

I join in the judgment of the court, and join Parts I, II and VI of the majority opinion. I write separately because I would approach this constitutional issue in a somewhat different manner.

## I.

Every grant of federal jurisdiction must fall within one of the nine categories of cases and controversies enumerated in Article III. See, e.g., *Hodgson v. Bowerbank*, 5 Cranch (9 U.S.) 303 (1809). We are concerned here with the Arising Under clause, whose function has long been debated. Under a traditional reading, the clause was intended only to ensure that federal courts are available to determine issues of federal law. Under this reading, when a particular jurisdictional grant embraces cases involving only state law issues, it falls outside the constitutional purview of the federal courts. However, under various theories of "protective jurisdiction," Congress may validly confer jurisdiction over any

case, regardless of the sources of law, if that jurisdiction serves to "protect" a federal interest.<sup>1</sup>

1. Protective jurisdiction exists largely in the academic literature. See, e.g., Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. Rev. 542 (1983); Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157 (1953); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Probs. 216 (1948); Note, *Over-Protective Jurisdiction?: A State Sovereignty Theory of Federal Questions*, 102 Harv. L. Rev. 1948 (1989); Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. Rev. 933 (1982); Note, *Protective Jurisdiction and Adoption as Alternative Techniques for Conferring Jurisdiction on Federal Courts in Consumer Class Actions*, 69 Mich. L. Rev. 710 (1971). Although it has been argued that protective jurisdiction was the actual basis for several Supreme Court decisions, the Court recently remarked that "[w]e have, in the past, not found the need to adopt a theory of 'protective jurisdiction' to support Art. III 'arising under' jurisdiction . . . ." *Mesa v. California*, 489 U.S. 121, 137 (1989).

Given the strong federal interest in nuclear power, the pervasiveness of federal regulation in the area, and the efficiency gains of consolidating litigation, it is likely that § 2210(n)(2) could be sustained under some or all protective jurisdiction theories. It appears that Congress enacted that provision in part because of the advantages of consolidating mass tort litigation in a single forum, regardless of the substantive federal issues involved. See, e.g., S. Rep. No. 218, 100th Cong., 2d Sess. 13, reprinted in 1988 U.S. Code Cong. & Admin. News 1476, 1488 ("[C]onsolidation . . . would avoid the inefficiencies resulting from duplicative determinations of similar issues in multiple jurisdictions. . . ."); H.R. Rep. No. 104, Part 1, 100th Cong., 1st Sess. 18 (1987) ("These measures stem from the desire of Congress for equitable and uniform treatment of victims of a nuclear accident and the need to coordinate all phases of litigation that could result from a large nuclear accident."). Protective jurisdiction is subject to criticism based on its lack of textual foundation, and the difficulty in developing limiting principles. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 460-484 (1957).

As does the majority, I would sustain § 2210(n)(2) under the traditional interpretation. I believe that public liability actions, as a class, contain sufficient substantive federal issues to bring the jurisdictional grant within the limits of Article III. As I see it, the difficulty here is that these issues may not arise in every public liability action. The Price-Anderson Act and other federal statutes contain safety regulations, waivers of defenses, insurance and indemnification provisions, and liability limitations that will affect many, but not necessarily all, state law claims arising out of nuclear incidents. This case, therefore, raises the question of the extent to which Congress may confer federal jurisdiction over state law cases that will not necessarily implicate substantive federal questions.

## II.

As a preliminary matter, I note certain factors that I would not rely upon to sustain the constitutionality of § 2210(n)(2). I would not place any emphasis on the definitional questions involved in deciding whether an action falls within the scope of the Amendments' jurisdictional grant. Nor would I rely on the fact that the public liability action "replaces" most state law causes of action arising out of nuclear incidents. In my opinion, Congress intended for state law to provide the substantive rules of decision for all public liability actions. Consequently, I believe § 2210(n)(2) grants

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(Frankfurter, J., dissenting). The traditional interpretation of the Arising Under clause, though, is not completely immune from the latter criticism.

federal jurisdiction over state law causes of action. Although federal statutes and regulations are likely to play a role in many public liability actions, I do not perceive substantive federal questions present at the outset of every such case.

The constitutionality of § 2210(n)(2) is unaffected by the fact that a court must decide various issues of federal law before determining that a particular claim qualifies as a public liability action. At the outset of every case brought under § 2210(n)(2), a court must decide whether a "nuclear incident" has occurred. See 42 U.S.C. § 2014(w), § 2014(q) (1988). The court must also determine whether the plaintiff's claim does not fall within the definition of "public liability" because it is a workmen's compensation claim, arises out of an act of war, or is an exempted property damage claim. *Id.* § 2014(w). Finally, the court is directed to apply the law of a particular state. *Id.* § 2014(hh).

Under *Osborn*, the federal ingredients necessary to satisfy Article III must be substantive in the sense that "the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction." *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822 (1824). Purely jurisdictional provisions cannot create the federal ingredient necessary to support "arising under" jurisdiction. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 495-496 (1983). In *Verlinden*, the Court faced the unusual situation where the jurisdictional provisions of the Foreign Sovereign Immunities Act ("FSIA") incorporated substantive federal defenses. Under the FSIA, a finding that there is no federal

jurisdiction means that "the plaintiff will be barred from raising his claim in any court in the United States." *Id.* at 497. Here, by contrast, a finding that a particular claim does not fall within the definition of "public liability" does not preclude the plaintiff from pursuing that claim in state court under a different name. Such a finding does not affect the substantive rights of any party, as required under the *Osborn* rule.

The choice of law provision is not strictly jurisdictional in the same sense. However, whenever Congress provides original federal jurisdiction over state law claims, a federal court must decide the choice of law question. If such provisions could sustain arising under jurisdiction, there would be no constitutional limits on Congress' powers. Because jurisdiction under § 2210(n)(2) is concurrent, § 2014(hh) goes somewhat further than an ordinary choice of law rule. If a public liability action proceeds in state court, federal law requires that court to apply the law of the state where the nuclear incident occurred, even if state law would otherwise look to the law of some other state. Therefore, federal law might alter the substantive law applied in some state court actions. Nevertheless, I would not sustain a grant of federal jurisdiction based on the effect of federal law on state court actions.

The inquiry is unchanged by the fact that Congress chose to create a "new" federal cause of action, rather than simply provide for federal jurisdiction over state law claims. If Congress had truly pre-empted state law causes of action and replaced them with federal claims governed by federal rules of decision, the Amendments would clearly be constitutional. For example, Article III



would not be contravened if Congress had intended for courts to apply federal common law in public liability actions. In *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), the Court similarly avoided constitutional difficulties by construing § 301 of the Labor Management Relations Act as authorizing the application of federal common law. However, if state law, as opposed to federal statutory or common law, provides the rules of decision, it should make no difference that Congress has chosen to rename certain causes of action under the rubric of "public liability actions."

I believe Congress intended for state law, acting of its own force, to provide the rules of decision in public liability actions. In *Pennsylvania v. General Public Utilities Corp.*, 710 F.2d 117, 122 (3d Cir. 1983), we held that federal common law has no application in the actions before us now. I do not believe Congress intended for the Amendments to overturn this result. On the contrary, Congress apparently reaffirmed it. Unlike § 301 of the LMRA, Congress expressly referred to state law as providing the rules for decision. Moreover, Congress did not refer to "general" state law, but intended that public liability actions be governed by the separate law of each state where a particular incident occurs. As one report noted,

*Rather than designing a new body of substantive law to govern such cases, however, the bill provides that the substantive rules for decision in such actions shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the Price-Anderson Act.*



H.R. Rep. No. 104, Part 1, 100th Cong., 1st Sess. at 18 (1987) (emphasis added) [hereinafter "House Report"]. See also *id.* at 5 ("Liability is determined under applicable state tort law."). Consequently, unlike under § 301 of the LMRA, I believe state law remains "an independent source of private rights." *Lincoln Mills*, 353 U.S. at 457.

Defendants stress that § 2014(hh) provides that the rules of decision in public liability actions are to be "derived from" state law. However, I would not read these words as authorizing the application of federal common law, or the selective application of state law. Such a reading is not supported by the structure of the Amendments. For example, § 2210(n)(2) provides for concurrent jurisdiction. If a public liability action is not removed, it may proceed in state court. Are these state courts to apply federal law which is "derived from" the law of their own state, but which is somehow different from that state law? Similarly, § 2014(hh) requires courts to apply the law of the state in which a particular accident occurred. Thus, unlike under § 301 of the LMRA, courts could not fashion a uniform body of federal law applicable to public liability actions. Cf. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 249-58 (1984) (detailing Congress' intent that the Atomic Energy Act should not pre-empt state tort liability). There would also be some potential for forum-shopping, as a defendant might remove a case to federal court when it desires that a particular state law rule be disregarded.

Having determined that state law remains an independent source of private rights, I would not place any emphasis on the fact that state law may

have been "incorporated" into federal law. Mere incorporation of state law cannot by itself satisfy Article III. If it could, every purely jurisdictional grant would become constitutional if Congress simply added language declaring that state law operates as federal law. See, e.g., Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. Rev. 542, 558 (1983) (Incorporation alone cannot satisfy Article III because it "does not generate any new independent federal rights or obligations."). The mere presence of some state law issues in an otherwise federal cause of action will not invalidate a jurisdictional grant. See, e.g., *Osborn*, 22 U.S. (9 Wheat.) at 819-20. But where Congress has simply provided a federal forum for the adjudication of state law claims, the constitution requires some further justification. Other statutes which follow the same incorporational scheme as the Amendments, such as the Outer Continental Shelf Lands Act and the Federal Tort Claims Act, should be scrutinized independently.<sup>2</sup> Cf. *Federal Deposit Ins. Corp v. George-Howard*, 153 F.2d 591, 593-94 (8th Cir.) (sustaining former F.D.I.C. jurisdictional provisions under *Osborn* and other

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2. The constitutionality of these particular statutes have never been challenged, and they might be sustained without referring to their incorporational provisions. The Lands Act may fall within the Admiralty clause of Article III, which does not require an independent federal law component. See *The Propeller Genesee Chief v. Fitzhugh*, 12 How. (53 U.S.) 443, 451-53 (1852). The FTCA may be a valid application of the grant of federal jurisdiction over "Controversies to which the United States shall be a party." I express no opinion, however, on the constitutional bases of these statutes.

decisions involving instrumentalities of the federal government), *cert. denied*, 329 U.S. 719 (1946).

### III.

In *Verlinden*, the Supreme Court held that the scope of the constitutional grant of "arising under" jurisdiction is broader than the scope of the statutory federal question grant under 28 U.S.C. § 1331. *See* 461 U.S. at 495. Under the statutory grant, federal jurisdiction is authorized only for those actions that satisfy the "well-pleaded complaint" rule. *See, e.g., Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908). Similarly, under the general removal statute, a defendant may not remove an action that does not satisfy the well-pleaded complaint rule. *See, e.g., Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986). Under that rule, a plaintiff cannot bring an action in federal court based upon anticipated federal questions that may arise in a defense. Thus, because the constitutional grant is broader, it must encompass at least some cases where no federal question is apparent from the complaint.

In *Stibitz* and *Klick*, we held that the actions before us now do not satisfy the well-pleaded complaint rule, because they are founded entirely in state law. The Amendments specifically provide for federal jurisdiction over the same cases. Therefore, we are squarely presented with the question of defining the "gap" between the scope of the statutory grant and the limits of Article III. As the majority notes, these limits remain largely unexplored. The Amendments create a "new" federal cause of action encompassing most claims arising out of any "nuclear incident." However,

instead of prescribing new federal rules of decision, or authorizing the application of federal common law, Congress directed that the rules of decision are to be "derived from the law of the State where the nuclear incident involved occurs, except where such law is inconsistent with the provisions of [the Price-Anderson Act]." 42 U.S.C. § 2014(hh) (1988). I believe the Amendments thereby grant federal jurisdiction over a class of state law claims in which the existence of substantive federal questions, although likely, is only speculative. Until some substantive federal statute or regulation is implicated, a public liability action will proceed entirely on state law grounds.

The Supreme Court has not had occasion to explore fully the extent to which Congress may confer federal jurisdiction over cases in which the application of federal law is speculative. In *Verlinden*, the Court recognized that *Osborn* can be read broadly to validate all such jurisdictional grants, but noted that some have questioned a principle that would permit "assertion of original federal jurisdiction on the remote possibility of presentation of a federal question." 461 U.S. at 492-93 (quoting *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 482 (1957) (Frankfurter, J., dissenting)). However, the Court left that question open, stating that

We need not resolve that issue or decide the precise boundaries of Art. III jurisdiction . . . since the present case does not involve a mere speculative possibility that a federal question may arise at some point in the proceeding. Rather, a suit against a foreign state under [the

FSIA] necessarily raises questions of substantive federal law at the very outset, and hence clearly "arises under" federal law, as that term is used in Art. III.

*Id.* at 493.

I believe this case raises that question. As I note below, I do not believe the holding in *Verlinden* ultimately rests on the fact that substantive federal questions are present at the outset of every case brought under the FSIA. In any event, the Amendments do not mandate a similar application of federal law at the outset of every public liability action. Rather, we must determine whether various federal statutes and regulations affecting nuclear power, although not necessarily implicated in every public liability action, are sufficient to bring the jurisdictional grant within the confines of Article III.

It is difficult to formulate a bright-line test for this inquiry. As with the federal question statute, "determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 810 (1986). I believe the answer lies in evaluating the reasons that may have led Congress to provide for original federal jurisdiction even though the existence of federal questions is somewhat speculative. I would sustain § 2210(n)(2) because I believe a federal court should be open to determine the important federal questions that might arise in public liability actions, and to implement the federal scheme for the orderly disposition of large-scale nuclear accident litigation. Although Congress could have

ensured that purely state law cases remained in state court by providing for appellate or removal jurisdiction upon the raising of a federal question. I believe it had valid reasons for establishing original federal jurisdiction over public liability actions.

#### A. THE PRECEDENTS

In my opinion, the prior case law does not dictate the applicable standards when Congress has granted federal jurisdiction over cases in which the existence of federal questions is speculative. Although *Osborn* and *Verlinden* do not require the invalidation of the jurisdictional grant at issue here, I do not believe they provide a complete framework for deciding the precise issue confronting us.

##### 1. *Osborn*

As noted in *Verlinden*, the breadth of *Osborn*'s holding has been debated. *Osborn* certainly could have been decided on narrower grounds. The case involved a frontal attack on federal authority by the State of Ohio. Despite the Supreme Court's earlier holding in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), Ohio challenged the constitutionality of the Bank's immunity from state taxation. Chief Justice Marshall could have sustained the jurisdictional provision based on the federal constitutional issues present in the case, but instead he found the necessary "federal ingredient" in the Bank's charter. Because the federal charter created the Bank and bestowed upon it all its legal capacities, the charter "itself is the first ingredient in the case — is its origin

— is that from which every other part arises." 22 U.S. (9 Wheat.) at 825.

This reasoning formed the basis for the holding in *Osborn's* companion case, *Bank of the United States v. Planters' Bank*, 22 U.S. (9 Wheat.) 904 (1824). In that case, the Court upheld the Bank's ability to sue in federal court upon a contract. In *Osborn*, the Court noted that every such case involves preliminary questions regarding the Bank's ability to sue and make contracts. Although it is unlikely that the question of the Bank's ability to sue would ever be litigated,

[t]he question forms an original ingredient in every cause. Whether it be, in fact, relied on or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought.

22 U.S. (9 Wheat.) at 824.

This reasoning implies a broad scope for the Arising Under clause, under which Congress may confer federal jurisdiction "whenever there exists in the background some federal proposition that might be challenged, despite the remoteness of the likelihood of actual presentation of such a federal question." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 471 (1957) (Frankfurter, J., dissenting). If this were the rule, there would be virtually no limit to Congress' authority. It is difficult to conceive of a case in which some federal issue could not be raised by some party at some point in the litigation. Perhaps because of this fact, *Osborn's* broad holding has largely been



limited to similar cases involving federal charters and federal instrumentalities. See, e.g., *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885) (federally chartered railroads); *Katser v. Memorial Blood Center of Minneapolis, Inc.*, No. 89-5533 (8th Cir. Apr. 10, 1991) (American Red Cross); *Federal Deposit Ins. Corp. v. George-Howard*, 153 F.2d 591, 593-94 (8th Cir.) (F.D.I.C.), cert. denied, 329 U.S. 719 (1946). In cases involving the federal question statute, the Supreme Court has recognized these limitations, indicating that "the doctrine of the charter cases [is] to be treated as exceptional, though within their special field there [is] no thought to disturb them." *Gully v. First Nat'l Bank*, 299 U.S. 109, 114 (1936); see also *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 379 n.50 (1959) (*Railroad Removal Cases* was an "unfortunate decision"); *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 485 (1933) (refusing to extend doctrine); cf. 28 U.S.C. § 1349 (1988) (limiting federal jurisdiction over federally chartered corporations where the United States owns less than half of the stock). In *Mesa v. California*, 489 U.S. 121, 136-39 (1989), the Court strongly indicated that a grant of federal jurisdiction over all claims involving federal officers would be invalid.

But even if the reasoning in *Osborn* is extended beyond cases involving federal charters, it does not necessarily require us to sustain § 2210(n)(2). In *Osborn*, the court emphasized that the Bank's federal charter formed an "original ingredient in every cause" involving the Bank. 22 U.S. (9 Wheat.) at 824. The federal question regarding the Bank's ability to sue or be sued is an element of every case, regardless of whether it is actually

raised. See Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. Law Rev. 933, 970 (1982) ("The 'original ingredient' is . . . properly defined as a federal issue that comprises a logical component of plaintiff's cause of action, whether or not this issue is in dispute or explicitly raised."). Here, by contrast, there is no substantive federal question that is a predicate to every public liability action. Defendants, although indemnified and licensed by the federal government, do not derive their legal existence from an act of Congress. There are numerous federal questions that may arise in public liability actions. But these questions would not be "original ingredients" in the sense that the term is used in *Osborn*, because it would not necessarily be possible to raise them in every case.

## 2. *Verlinden*

In *Verlinden*, the Court likewise stressed the fact that substantive federal issues are present at the outset of every FSIA case. Although such cases will generally proceed entirely on state law grounds, a court must determine that the defendant is not immune before assuming jurisdiction. Unlike in *Osborn*, these issues are not merely hypothetical, but must be addressed in every case. Therefore, because the existence of substantive federal questions was not merely speculative, the Court found no occasion to examine the breadth of *Osborn*.

However, this reasoning rests to a large degree on the peculiar way in which Congress chose to draft the FSIA. In non-FSIA cases, sovereign immunity ordinarily is raised as a defense to a

plaintiffs cause of action. Unless a defendant chooses to litigate the issue, it will not be raised. There will be numerous cases against sovereign defendants in which immunity is clearly unavailable. Under the FSIA, however, a court must ascertain at the outset whether immunity exists, regardless of whether the parties choose to litigate the issue. See *Verlinden*, 461 U.S. at 494 n.20. Thus, by drafting the statute to require courts to address federal immunity defenses at the outset of every case, Congress transformed what might have been a speculative federal question into a "necessary" federal ingredient.

I do not believe the constitutionality of a jurisdictional statute should depend on such drafting peculiarities. In the FSIA, Congress could have permitted defendants to raise sovereign immunity as a federal defense, rather than requiring the issue to be decided as a jurisdictional prerequisite. If Congress had done so, the federal ingredient would have been no less substantial. Similarly, in cases that would otherwise involve only state law, Congress could always require that some substantive federal defense be addressed at the outset. For example, in public liability actions, it could have required the court to determine that the defendant has no Eleventh Amendment immunity, even if the Eleventh Amendment is implicated in only a small fraction of cases. Article III would have few practical limits if the constitutional inquiry turns solely on whether Congress requires that some federal defense be addressed in every case.

I believe *Verlinden* must ultimately rest upon more than the statutory requirement that immunity be confronted at the outset of every

case. If the immunity issues were of little federal concern, or would be implicated in only a small number of cases, the fact that they must necessarily be addressed should not affect the Article III inquiry. Rather, the Court stressed that "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident." *Id.* at 493. The Court also emphasized that the FSIA represents a "comprehensive regulatory statute." *Id.* at 497.

But even if *Verlinden* rests upon the particular way in which Congress drafted the FSIA, it would not control here. As I have noted, there are no substantive federal questions present at the outset of every public liability action. Congress has not chosen to require courts to address substantive federal defenses in every case. Rather, we must rely upon the existence of substantive federal issues that will likely, but not necessarily, arise in every case.

#### B. DISCUSSION

Because the scope of the Arising Under clause is broader than its statutory counterpart, a jurisdictional grant is not unconstitutional merely because a federal question is not apparent from the plaintiff's complaint. Because of the complex involvement of federal law in the wide range of state law cases, it is difficult to determine when Congress has exceeded its authority in providing original federal jurisdiction when federal issues are only speculative. Nevertheless, I believe it is possible to identify factors that should guide the inquiry.

One important factor is the likelihood that substantive federal issues will arise in a particular class of cases. Article III strikes a balance between the legitimate domains of state and federal courts. If a particular jurisdictional grant encompasses only a small proportion of cases in which a federal question will ever be raised, the incursion on state court authority might be considered too large. I would therefore determine whether Congress' grant of jurisdiction bears a substantial relationship to the federal interest in ensuring that a federal court be available to enforce federal law. Although it will not be possible to estimate with mathematical certainty the likelihood that federal questions will arise in a particular class of cases, we can examine the relationship between the scope of the jurisdictional grant and the ultimate rationale for providing original federal jurisdiction.

In this vein, Congress has alternatives to providing original federal jurisdiction when federal questions are not directly implicated in the plaintiff's cause of action. In addition to federal appellate review, Congress may provide for federal removal jurisdiction upon the raising of a federal question. The dissent in *Osborn* felt that these were the only permissible methods of conferring federal jurisdiction when the existence of federal questions is speculative. See 22 U.S. (9 Wheat.) at 889 (Johnson, J., dissenting) ("I see no practical mode of determining when the case does occur, otherwise than permitting the cause to advance, until the case for which the constitution provides shall actually arise."). See also *Mesa v. California*, 489 U.S. 121 (1989) (avoiding constitutional difficulties by interpreting federal officer removal statute as authorizing removal only when a federal

defense is raised); *Lincoln Mills*, 353 U.S. at 481-82 (Frankfurter, J., dissenting).

*Osborn* establishes that Congress is not necessarily relegated to providing appellate or removal jurisdiction when the existence of federal questions may be speculative. Nevertheless, if there are any limits on the ability of Congress to confer original jurisdiction over such cases, the availability of this option is a factor to be considered. In *Osborn*, the Court rejected appellate jurisdiction as an alternative, because a claimant under federal law should not be relegated to "the insecure remedy of an appeal, upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will." 22 U.S. (9 Wheat.) at 822-23. In situations such as *Osborn*, where Congress is specifically concerned with state hostility to federal interests, this factor might carry weight. In *Verlinden*, the Court was concerned that sensitive issues of foreign relations would be implicated if an immune foreign sovereign were forced to litigate in state court. Consequently, it is important for a federal court to decide federal immunity issues in an exercise of original jurisdiction.

But Congress may have other valid reasons for desiring that federal courts assume original, rather than appellate or removal, jurisdiction. For example, if potential federal issues are intertwined with the merits of the case and cannot be discerned at an early stage of litigation, appellate or removal jurisdiction might not adequately ensure that a federal court could fully adjudicate all aspects of federal law. Conversely, if federal issues are collateral to the merits, or easily



discerned at the outset of the case, the need for original jurisdiction would be lessened. The existence or lack of a valid preference for original jurisdiction should be an important factor when Congress has granted such jurisdiction over cases that do not satisfy the well-pleaded complaint rule.

Guided by these principles, I would examine the ways in which federal law could be implicated in public liability actions. The Amendments provide the options of original federal jurisdiction and immediate removal for almost all claims asserting "any legal liability" on account of a nuclear incident. This definition apparently encompasses any state law cause of action, but the vast majority would presumably sound in tort. In general, there are three important ways in which federal issues could be implicated in these actions. First, a federal statute or regulation might be relevant in determining the applicable standard of care. Second, in the event of an extraordinary nuclear occurrence, federally indemnified defendants may be required to waive certain defenses. Third, various federal statutes or regulations affect a plaintiff's amount of recovery in certain cases, as well as the allocation of costs among defendants and the federal government.

### *1. Federal Standard of Care*

The majority relies primarily on the pre-emption of state tort law duties by federal regulations. In the cases before us, at least some plaintiffs have alleged negligence per se predicated on defendants' failure to follow applicable federal safety regulations. Similar claims will doubtless arise in many public liability actions. Nuclear power is



subject to pervasive federal regulation, and it is likely that a tort suit arising out of a nuclear incident will touch on some issue governed by federal standards. Absent an express federal cause of action for the violation of federal safety standards, incorporation of those standards into state tort claims would probably not satisfy the well-pleaded complaint rule. See *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986). In any event, we are bound by our decisions in *Stibitz* and *Kilick*, which imply as much. However, the constitutional inquiry is not limited by such considerations. If Congress had granted original federal jurisdiction only over state law claims incorporating federal standards, such a grant would likely be constitutional. Federal law would be a non-speculative ingredient in every case.

As I see it, the difficulty here is that § 2210(n)(2) encompasses more than just actions incorporating federal standards of care. Public liability actions include virtually all claims based upon any legal liability arising out of a nuclear incident. Conceivably, some actions might not sound in tort at all, and others could implicate areas of activity not explicitly governed by federal standards. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984) (state tort law principles apply to nuclear accidents unless "expressly supplanted."). Although many or all of the cases before us now may contain claims based upon the violation of federal regulations, we are met with a facial challenge to the constitutionality of the entire jurisdictional grant, and have not been asked to restrict its application to such cases.

Moreover, it is not clear to me that Congress has precluded state law tort suits predicated on standards of care that do not conform to federal regulation. As the majority notes, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983), the Court held that the Atomic Energy Act pre-empts all state regulation of nuclear safety. But in *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Court considered the holding of *Pacific Gas* in the context of private tort law. In *Silkwood*, the Court held that Congress did not intend to pre-empt punitive damages awards under state tort law. The Court relied on the legislative history of the Price-Anderson Act, which indicated that Congress intended to retain all state tort law remedies. The Court noted that "Congress assumed that traditional principles of state tort law would apply with full force unless they were expressly supplanted," and that the defendant has the burden of demonstrating pre-emption. *Id.* at 255. It also indicated that a state may impose strict liability for nuclear accidents. *Id.* at 254, 256. See also *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 186 (1988) (Characterizing *Silkwood* as finding that "Congress was willing to accept regulatory consequences of application of state tort law to radiation hazards even though direct state regulation of safety aspects of nuclear energy was pre-empted.").

If state tort law may hold a nuclear plant operator strictly liable, or establish some other standard of care that does not conform to federal regulation, the federal law quotient in public liability actions would be decreased. As noted in the majority opinion, notwithstanding *Silkwood*, at

least two district courts have found that the Price-Anderson Act pre-empts state tort suits that do not adopt federal regulations as the standard of care. See *Hennessy v. Commonwealth Edison Co.*, 1991 WL 81189 (N.D. Ill. Apr. 26, 1991); *O'Conner v. Commonwealth Edison Co.*, 748 F. Supp. 672 (C.D. Ill. 1990). In *Hennessy*, however, the court left open the issue of whether state law may impose strict liability for nuclear incidents.<sup>3</sup>

Unlike the majority, I would not decide these issues here. Regardless of whether state tort law may impose a standard of care that differs from federal norms, that law will often incorporate federal standards, and therefore a large number of public liability actions will rest upon alleged violations of federal regulations. In other cases,

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3. In this respect, it should be noted that Congress has established as a matter of federal law what amounts to strict liability for many "extraordinary nuclear occurrences." For those accidents, 42 U.S.C. § 2210(n)(1) may require indemnified or insured defendants to waive certain state law defenses. Legislative history makes clear that Congress intended for these waivers to create a common standard of strict liability. See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 65-66 (1978) (citing S. Rep. No. 1605, 89th Cong., 2d Sess. 6-10 (1966)). Given this fact, it is doubtful that Congress intended to forbid states from imposing strict liability for non-extraordinary nuclear incidents. If Congress intended to permit strict liability, it could be argued that it also intended to permit the less intrusive option of fault-based standards of care that are more stringent than federal regulations. It is even more likely that no conflict with the federal scheme would be posed by less stringent tort standards. The Amendments modify *Silkwood's* primary holding that punitive damages are never pre-empted by federal law, but it is unclear to what extent the rest of its reasoning survives. The relevance of § 2210(n)(1) to this case is discussed below.

defendants will raise these issues in defense. Because federal safety regulations will play an integral role in a large proportion of such actions, Congress could validly desire that a federal court be open to interpret these regulations when they become an issue.

But I would not predicate the constitutionality of § 2210(n)(2) solely on the likelihood that federal safety regulations will play a role in public liability actions. If Congress wishes to ensure that federal courts decide these important issues, it need not grant broad original jurisdiction over all state law claims. Congress could have provided original jurisdiction where the plaintiff's cause of action directly incorporates a violation of federal law, and removal jurisdiction where the defendant raises a federal regulatory issue in defense. Although there might be some disruption of the proceedings in the latter instance, it is likely that such federal defenses could be raised early enough to avoid undue hardship. As I note below, though, I believe Congress had other valid reasons for providing original jurisdiction here.

## 2. *Waivers of Defenses*

Under § 2210(n)(1), Congress provided that in the event of certain extraordinary nuclear occurrences ("ENOs"), the Nuclear Regulatory Commission or the Secretary of Energy may require potential defendants to waive various state law defenses. The effect of these waivers would be to create a uniform federal strict liability standard for covered accidents. See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 65-66 (1978) (citing S. Rep. No. 1605, 89th

Cong., 2d Sess. 6-10 (1966)). The statute gives detailed descriptions of the issues and defenses to be waived, and provides that the waivers "shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action." 42 U.S.C. § 2210(n)(1) (1988). The waivers are expressly made judicially enforceable. *Id.*

It appears likely that Congress could provide original federal jurisdiction over those nuclear incidents to which the § 2210(n)(1) waivers would apply. The waivers essentially define a federal cause of action for certain covered accidents. But there are problems with relying on these provisions alone to sustain § 2210(n)(2). First, § 2210(n)(1) applies only to ENOs, while § 2210(n)(2) applies to all nuclear incidents. The Nuclear Regulatory Commission has conclusively determined that the TMI incident was not an ENO, and that decision is not subject to judicial review. *See id.* § 2014(j). Consequently, § 2210(n)(1) has no application to the cases before us. Although we are met with a facial challenge, and need not rely solely on factors applicable to this case, I would not place much emphasis on § 2210(n)(1) in sustaining § 2210(n)(2). Not only does § 2210(n)(1) apply only to a limited class of public liability actions, but that class of cases can be ascertained by reference to a single administrative pronouncement. *See* 10 C.F.R. § 140.83 (1991) (ENO determination ordinarily made within 90 days of incident). Thus, if § 2210(n)(1) were the sole predicate for federal jurisdiction, Congress could have easily narrowed the scope of the grant to include only cases in which it might be implicated.

Prior to the Amendments, Congress provided original jurisdiction only for ENOs. Given the effect of § 2210(n)(1) on liability for such occurrences, this earlier version of § 2210(n)(2) would certainly stand on stronger constitutional ground. But the application of § 2210(n)(1) would be speculative even in those instances. The waivers apply only in certain enumerated cases. See 42 U.S.C. § 2210(n)(1)(A)-(F) (1988). Moreover, they apply only to the extent that liability has been indemnified or insured. Finally, the statute does not mandate that administrative officials require waivers in every insurance policy or indemnification contract. Nevertheless, in the event of an ENO, the determinations of whether and how the waivers apply would be substantive federal questions arising in almost every case. Under *Verlinden*, these determinations would probably be sufficient to sustain a narrower grant of jurisdiction over cases arising out of ENOs.

### 3. *Financial Protection Scheme, Indemnification Provisions, and Liability Limitations*

The central focus of the Price-Anderson Act is its comprehensive scheme for insuring and indemnifying nuclear power plant licensees and contractors, and for limiting and apportioning liability arising out of nuclear incidents. These provisions were enacted primarily in response to the nuclear power industry's concerns that potential liability would hinder the development of nuclear power. See generally *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 63-67 (1978).



a. *Statutory Scheme*

The Nuclear Regulatory Commission is authorized to require power plant licensees and contractors to carry a certain amount of insurance or other forms of "financial protection." 42 U.S.C. § 2210(a),(b) (1988). In addition to the amounts available from private sources, licensees must participate in an industry-wide "retrospective" insurance plan that assesses "deferred premiums" after a nuclear incident when it appears that the primary protection will be exceeded. *Id.* § 2210(b). This plan has the effect of spreading excess liability across the entire industry. The Commission is required to indemnify licensees for public liability in excess of the required level of insurance. *Id.* § 2210(c). Thus, indemnification makes up the difference between the required level of insurance and the Act's liability limitations. Indemnification also extends to any other person who may be liable for public liability, which ensures that every victim will be compensated from some source. *Id.* §§ 2014(t), 2210(c). Special insurance and indemnification provisions apply to certain government contractors. *Id.* § 2210(d).

The Act places limits on the aggregate liability for a single nuclear incident. *Id.* § 2210(e). For larger facilities and licensees required to carry more than \$560,000,000 in insurance, the limit is the amount of required insurance. For larger facilities, the limit also includes a surcharge to cover legal fees in certain instances. For other licensees, the limit is \$560,000,000, except that it is somewhat lower when the required insurance is less than \$60,000,000. Other limits are applicable to contractors specially covered under § 2210(d), and incidents occurring outside the United States.



For nuclear incidents occurring after August 20, 1988, the Amendments also prohibit the awarding of punitive damages, and immunize certain lessors. *Id.* § 2210(s), (r) (for effective date, see Price-Anderson Amendments Act of 1988, Pub. L. 100-408, § 20(a), 102 Stat. 1066, 1084). The Act ensures aggregate recovery by plaintiffs up to the limits set in § 2210(e). A certain amount of liability will be covered by the required insurance, and the government must indemnify the defendant for the balance.

If the limits are exceeded, special provisions apply. Upon the motion of any interested party, the federal district court in the district where the nuclear incident occurred must determine whether the aggregate liability may exceed the limits provided in the Act. *Id.* § 2210(o)(1). If the court determines that the limits may be exceeded, it must formulate a distribution plan to "insure the most equitable allocation of available funds." *Id.* § 2210(o)(1)(C). This plan must include allocations for latent injury claims which may not be discovered until a later time. *Id.* No payment may exceed 15% of the liability limits without prior court approval. *Id.* § 2210(o)(1)(A). Payment of legal fees is also subject to restrictions. *Id.* § 2210(o)(2). If the liability limits are exceeded, Congress is directed to provide full and prompt compensation for the unsatisfied liability. *Id.* § 2210(e)(2), § 2210(i).

b. *Financial Protection and Indemnification Provisions*

An important feature of the Price-Anderson Act is its "omnibus coverage" scheme. See, e.g., House Report, Part 1 at 5. In return for limiting

defendants' liability in certain instances, the Act ensures compensation up to those limits from either required insurance or government indemnification. See *Duke Power*, 438 U.S. at 90-92 (assured compensation is adequate substitute for limited liability). There will be virtually no cases in which compensation will not come from one of these federally-mandated sources. As one report notes, "the insurance and other financial protection requirements, indemnities, and limitations on liability cover any person found liable for damages from a nuclear incident." House Report, Part 3 at 16.<sup>4</sup> Therefore, these provisions arguably constitute federal ingredients applicable to every public liability action.

But the financial protection and indemnification scheme does not affect the defendant's liability under state law. Rather, it ensures that any judgment can be satisfied once it has been entered. Thus, these provisions are probably not "original ingredients" of the plaintiff's cause of

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4. The statutory definition of "persons indemnified" includes "any . . . person who may be liable for public liability." 42 U.S.C. § 2014(t). Although the substantive indemnification provisions incorporate this definition, they can be read as extending only to accidents involving licensees who are required to carry financial protection. See *id.* § 2210(c); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251-52 n.12 (1984) (government indemnification available only to those required to maintain financial protection). There appears to be some tension between this reading of § 2210(c) and Congress' expressed intent of assuring compensation for every victim of a nuclear incident.

action.<sup>5</sup> Article III would likely permit Congress to provide original federal jurisdiction over actions requiring government indemnification, if only because the United States would become a party. When the government believes that it will be required to make indemnity payments in a particular action, it is authorized to take over that action and approve any settlement. *Id.* § 2210(h).

But government indemnification will not be necessary in every public liability action, as it applies only to liability not covered by required insurance. As for the financial protection provisions, federal questions involving them may arise at various stages of a public liability action. All insurance policies must be approved by the

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5. It appears that the omnibus coverage scheme was designed in part to lessen the plaintiff's burden to identify the defendant whose actions caused the injury. See House Report, Part 3 at 16 ("[R]egardless of whether a commercial power plant accident was caused by actions of the licensee, the plant manufacturer, or any other party, liability would be 'channelled' to the licensee and payment would be obtained from the compensation pool funded by utilities. This is another significant departure from normal tort law precepts, and is designed to ease the victim's legal burden by obviating the need to identify the exact party at fault in order to recover damages."); see also *id.*, Part 1 at 5. On its face, the Act does not alter state law liability principles, but only assures compensation once liability has been established. However, because every victim is assured of compensation, Congress apparently intended to abrogate any requirement that the victim identify the actual tortfeasor. A court might still have to decide whether compensation will come from an insurance fund or from government indemnification, but the plaintiff would not have to identify a particular defendant. Lessening the plaintiff's burden in this manner would probably not create an original federal ingredient because this feature would not necessarily apply to every case.

Commission and conform to its regulations. See 10 C.F.R. §§ 140.10-.91 (1991). Consequently, any questions regarding the conformity of a policy to federal regulations would involve substantive issues of federal law. The Commission must approve every policy, and has published detailed sample forms. See *id.* §§ 140.15(d), 140.91. But every interpretation of the terms of individual policies would not necessarily involve federal questions.

The omnibus coverage scheme substantially increases the likelihood that federal questions will arise in public liability actions. No claim can be satisfied without reference to this comprehensive scheme. The remaining question is whether Congress had a valid reason for granting original federal jurisdiction over all cases that might implicate these issues, rather than creating some other scheme under which purely state law cases could remain in state court. Federal insurance and indemnification questions are largely collateral to the merits of the plaintiff's cause of action, affecting only the source of funds from which a judgment or settlement could be satisfied. Because of this fact, Congress could have authorized federal declaratory judgment suits in which defendants, insurance companies, and the government could resolve whatever federal law disputes might arise.

The prospect of federal indemnification might create a valid reason for conferring original federal jurisdiction, because it is not always possible to know at the outset of the case whether the government will be required to indemnify a claim. Factual development will often be necessary before it can be determined that a particular accident is not covered by insurance, or that the limits of

financial protection will be exceeded. By this time, it may be somewhat onerous to remove a case to federal court. But this argument could be made of almost every grant that raises the possibility that a federal question might be implicated in some cases. The government is authorized to intervene in public liability actions as soon as it believes it will be required to indemnify a party. Congress could have authorized removal in those instances, as it has under the federal officer removal statute. With respect to that statute, the Court has indicated that any other scheme would be unconstitutional. *See Mesa v. California*, 489 U.S. 121 (1989) (interpreting 28 U.S.C. § 1442(a)(1)). In addition, because the indemnification issues do not directly affect the merits of the plaintiff's case, the necessity for original jurisdiction is decreased.

*c. Liability Limitations*

The liability limitations, including the ban on punitive damages, arguably constitute "original ingredients" under *Osborn*, assuming its broad reasoning is extended past its specific domain.<sup>6</sup>

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6. The ban on punitive damages applies only to nuclear incidents occurring after August 20, 1988, which does not include this case. As I have noted, however, plaintiffs have made a facial challenge to § 2210(n)(2), and we are therefore not necessarily precluded from considering factors applicable only to future cases. But I would not consider the ban on punitive damages to be integral to the validity of § 2210(n)(2). Consequently, even if I were to construe plaintiffs' challenge as limited to the retroactive removal provisions of § 2210(n)(2), I would find the statute constitutional. It should also be noted that punitive damages remain available when the government is not obligated to make payments under an indemnification agreement. *See* 42 U.S.C. § 2210(s) (1988).

The right to recover damages is generally considered an element of any tort claim. As the Supreme Court has recognized, the Act's liability cap abrogates common law rights of recovery. See *Duke Power*, 438 U.S. at 88. Consequently, it could be argued that the federal liability limitations form an "ingredient" in any state law cause of action, whether or not they are implicated in a particular case. It is an open question whether a federal remedial scheme governing state law claims is sufficient to sustain a jurisdictional grant.<sup>7</sup> In *Verlinden*, the Supreme Court expressly did not decide whether the FSIA's ban on punitive damages could constitute the federal ingredient necessary to sustain jurisdiction. See *Verlinden*, 461 U.S. at 495 n.22 (discussing 28 U.S.C. § 1606).

I do not believe that the liability limitations are "original ingredients" because they are not necessarily implicated in every case. If the limits are not exceeded and the plaintiff would not

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7. Compare Goldberg-Ambrose, *The Protective Jurisdiction of the Federal Courts*, 30 UCLA L. Rev. 542, 557-58 (1983) (When federal law controls the measure of damages, "the rights and obligations of the parties are defined at least in part by federal law, and a constitutional basis for federal jurisdiction exists without resort to an exotic theory of protective jurisdiction.") with Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. Rev. 933, 1012 (1982) (Limitation on punitive damages "is a regulation of the remedial power of the courts. All of the federal courts' remedial powers . . . are creatures of federal law; they do not thereby raise federal questions."). In *Ives v. W.T. Grant Co.*, 522 F.2d 749 (2d Cir. 1975), the court sustained federal jurisdiction under a portion of the Truth in Lending Act that authorized a federal remedy for state law claims. The court, however, did not discuss constitutional concerns.



otherwise have sought punitive damages, the federal limitations would not be implicated. The Price-Anderson Act does not replace state law remedies in all cases. Rather, it only limits them in certain instances. The application of the liability limitations is therefore speculative, and they do not form "original ingredients" in the *Osborn* sense. Unlike the factors noted in *Osborn*, they do not form "unexpressed" elements in every claim.

Nevertheless, Congress was clearly concerned with the prospect that the liability limits might be exceeded. The federal questions discussed above, although important considerations, do not completely explain why Congress amended § 2210(n)(2) to provide for original federal jurisdiction over all nuclear incidents. A central concern was that "consolidation of claims in a single court would be essential for the orderly distribution of the limited funds available and to assure reservation of sufficient funds for victims whose injuries may not become manifest until long after the accident." House Report, Part 1 at 18. Congress felt that such concerns were present even when an incident was not serious enough to qualify as an ENO. *Id.*

When it appears that the liability limits may be exceeded in a particular case, a comprehensive federal distribution scheme is put in place. See 42 U.S.C. § 2210(o) (1988). These statutory provisions ensure that plaintiffs whose claims are adjudicated or settled quickly will not prejudice the recovery of other victims. A federal court is directed to formulate and implement a plan that will ensure equitable distribution of limited funds. Of particular concern with nuclear incidents is the prospect of "latent injury claims which may not be



discovered until a later time." *Id.* § 2210(o)(1)(C). These distribution provisions, together with the liability limits, create substantive federal questions applicable whenever a determination has been made under § 2210(o)(1). The federal questions are substantive in the *Osborn* sense because the plaintiff's right to recovery can be defeated by federal law.

As with other substantive federal issues that might arise in public liability actions, the application of these provisions is speculative. The question remains, then, whether Congress had other options that would have allowed state courts to retain jurisdiction over cases involving only state law issues. Congress could have authorized removal of pending cases upon the determination that the liability limits may be exceeded. Similarly, Congress could have retained the pre-Amendments scheme, under which a federal court was authorized to formulate a distribution plan that would also apply to cases pending in state courts. The federal distribution plan is expressly made effective throughout the United States. *Id.* § 2210(o)(1)(C). This provision was retained for those cases that remain in state court under current law. Consequently, Congress could have ensured that federal law issues be determined by a federal court without also authorizing federal jurisdiction over state law claims that will never involve those issues.

But I believe the prospect that the limits might be exceeded establishes a valid reason for providing the option of original federal jurisdiction. Unlike the ENO determination, the § 2210(o)(1) determination cannot necessarily be made soon after the nuclear incident. The full scope of

potential liability, including latent liability, may not be known until a later time. By this time, Congress' concern for the "equitable allocation of available funds" may have been compromised. Initial consolidation of cases would help avoid the premature dissipation of the insurance fund before a § 2210(o)(1) determination can be made. Even before such a determination, the federal courts are authorized to create a "special caseload management" panel if cases arising out of the nuclear incident will have an unusual impact on the court's work. *Id.* § 2210(n)(3). The panel is specifically authorized to establish priorities for the equitable distribution of claims. If all cases must remain in state court pending a § 2210(o)(1) determination, the federal distribution scheme may be rendered less effective.

The case for original jurisdiction is strengthened by the fact unlike insurance and indemnification issues, federal issues regarding the distribution of limited funds are not completely collateral to the litigation over the merits of the plaintiffs case. In addition to discerning the facts necessary to make the § 2210(o)(1) determination, a court must examine the conduct of the litigants to determine whether legal costs may be awarded from the insurance fund. 42 U.S.C. § 2210(o)(1)(D) (1988). Such a determination affects the plaintiffs' recovery, because legal costs authorized under § 2210(o)(1)(D) are included when deciding whether the liability limits have been exceeded. *Id.* § 2210(e)(1). Original jurisdiction helps ensure that a federal court can adjudicate facts necessary for the application of federal law. *Cf.* P. Bator, P. Mishkin, D. Meltzer & D. Shapiro, *Hart & Weschler's The Federal Courts and the Federal*

System 984 (3d ed. 1988) ("[I]t would be universally conceded that a . . . constitutional function of the federal courts is . . . to establish the facts determinative of the application of federal law even if the law's content and applicability are undisputed."). Because the effectiveness of the federal distribution scheme depends in part upon facts adduced during litigation on the merits of the case, the importance of original jurisdiction is increased. Congress should not be limited to authorizing a federal court to issue orders relating to cases pending in state courts.

Congress has admittedly decreased the effectiveness of its own scheme by providing for concurrent jurisdiction. If only some public liability actions are removed to federal court, a concurrent state court adjudication might compromise Congress' desire for the equitable distribution of limited funds. There is no provision for rescinding judgments that have already been satisfied, and a federal court cannot manage the conduct of ongoing state court litigation as it can for federal actions. In addition, a state court adjudication on a question of state or federal law would most likely be binding in a subsequent federal case involving the same defendant. See 28 U.S.C. § 1738 (1988). Congress clearly envisioned that § 2210(n)(2) would be used to consolidate most claims arising out of a nuclear incident. The defendants have removed all cases arising out of the TMI incident, and Congress has further encouraged consolidation by authorizing removal on the motion of the government. But such complete consolidation will not necessarily occur. Nevertheless, the federal scheme would be

furthered even if only some cases arising out of a nuclear incident are consolidated.

#### IV.

In the current era, Article III imposes few practical limits on the ability of Congress to confer federal jurisdiction. Just as the Commerce Clause and the Tenth Amendment now provide only nominal checks on Congress' ability to legislate substantively, Article III is a relatively minor impediment in the face of pervasive federal regulation. It is not difficult for Congress to enact some substantive law that would support federal jurisdiction over a particular class of cases. Nevertheless, it is still important to recognize constitutional limits when Congress grants original federal jurisdiction over state law claims. Unless Article III is broad enough to encompass protective jurisdiction, a jurisdictional grant must rest on more than a belief that a federal forum would be fairer or more efficient. There must be a sufficient substantive federal law component, and a reason why original federal jurisdiction is important to ensure federal court determinations of federal laws that may be implicated at some point in the litigation.

I would sustain § 2210(n)(2) based upon the substantial likelihood that public liability actions will involve federal questions regarding standards of care, insurance, and indemnification, combined with the need to protect a federal court's ability to formulate and administer a plan for distributing funds if the liability limits are exceeded. Although the application of federal law may be somewhat speculative, Congress had valid reasons for providing the option of original federal jurisdiction.

The Price-Anderson Act is a comprehensive regulatory provision directed at ensuring a limited level of recovery for the victims of nuclear incidents, and equitably distributing compensation should those limits be exceeded. *Verlinden* holds that Article III is not contravened merely because federal questions are not apparent from the plaintiff's complaint, and upheld a statute where immunity defenses constituted the only federal ingredient. I believe the rationale for permitting original federal jurisdiction is at least as strong here as it was in *Verlinden*.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals  
for the Third Circuit*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

<b>TMI COORDINATED</b>	<b>:</b>	<b>CIVIL ACTION</b>
<b>PROCEEDINGS</b>	<b>:</b>	<b>NO. 88-1538</b>
<b>This Order Relates to</b>	<b>:</b>	
<b>All Actions Except:</b>	<b>:</b>	<b>(Judge Rambo)</b>
	<b>:</b>	
<b>CV-88-1676</b>	<b>:</b>	
<b>CV-88-1677</b>	<b>:</b>	

**ORDER**

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT:

1) defendants' motion to release removal bonds is granted;

2) the Clerk of Court is directed to release all removal bonds filed in these proceedings;

3) plaintiffs' motion to remand is granted because the court finds Congress exceeded the scope of article III, section 2 of the United States Constitution by granting federal courts subject matter jurisdiction over public liability actions through the Price-Anderson Amendments Act of 1988;

4) execution of the remand is stayed; therefore, the Clerk of Court shall not return the files in these proceedings to the state courts from which they were removed;

5) it is the opinion of this court that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of the litigation; therefore, this court certifies for immediate appeal pursuant to 28 U.S.C. §1292(b) the issue of whether Congress exceeded the scope of article III, section 2 of the United States Constitution by granting federal courts

subject matter jurisdiction over public liability actions through the Price-Anderson Amendments Act of 1988.

/s/ SYLVIA H. RAMBO

Sylvia H. Rambo  
United States District Judge

Dated: March 16, 1990.



IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ANDREW LEWINTER, personal	:	CIVIL ACTION
representative of the Estate	:	NO. 88-1550
of MICHAEL LEWINTER,	:	
Plaintiff	:	
v.	:	
GENERAL PUBLIC UTILITIES	:	
CORP., et al.,	:	
Defendants	:	

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PERRI C. KIICK, et al.,	:	CIVIL ACTION
Plaintiffs	:	NO. 88-1552
v.	:	
METROPOLITAN EDISON	:	
COMPANY, et al.,	:	
Defendants	:	

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JOHN W. GUMBY, SR.,	:	CIVIL ACTION
Plaintiff	:	NO. 1:CV-90-98
v.	:	
GENERAL PUBLIC UTILITIES	:	
CORP., et al.,	:	
Defendants	:	

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HARRY MONTVILLE, et al.,	:	CIVIL ACTION
Plaintiffs	:	NO. 1:CV-90-370
v.	:	
GENERAL PUBLIC UTILITIES	:	
CORP., et al.,	:	
Defendants	:	

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JOHN B. ROCHE, III, et al.,	:	CIVIL ACTION
Plaintiffs	:	NO. 1:CV-90-530
v.	:	
GENERAL PUBLIC UTILITIES	:	
CORP., et al.,	:	
Defendants	:	

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MARGARET KRAFFT,	:	CIVIL ACTION
Plaintiff	:	NO. 1:CV-90-531
v.	:	
GENERAL PUBLIC UTILITIES	:	
CORP., et al.,	:	
Defendants	:	

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### MEMORANDUM AND ORDER

The captioned cases were removed to this court pursuant to the Price-Anderson Amendments Act of 1988. The plaintiff in CV-88-1550 joined in the motion to remand and all other related documents filed by the plaintiffs in *TMI Coordinated Proceedings*, CV-88-1538. This court has resolved the issue of remand in *TMI Coordinated Proceedings* and the memorandum and order dated March 16, 1990 in that matter are directly applicable to CV-88-1550. Therefore, the entire memorandum and order in *TMI Coordinated Proceedings* will be adopted for purposes of the motion in CV-88-1550.<sup>1</sup>

In the remaining cases, CV-88-1552, 1:CV-90-98, 1:CV-90-370, 1:CV-90-530 and 1:CV-90-531, no motions to remand have been filed. However, the removal statute mandates remand "[if] at any time before final judgment it appears that the district court lacks subject matter jurisdiction." 28 U.S.C.S. §1447(c) (Law. Co-op. 1989). Therefore, based upon this court's resolution of the jurisdictional issue in *TMI Coor-*

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1. The court notes that defendants did not file a motion to release the removal bond filed in CV-88-1550. Nonetheless, pursuant to the cases cited in Section A of the Discussion in the *TMI Coordinated Proceedings* memorandum, this court will direct that the removal bond be released.

*dinated Proceedings*, the court raises the question of remand in these cases *sua sponte*.

The memorandum and order in *TMI Coordinated Proceedings* apply in their entirety to CV-88-1552. Although no motion to release the removal bond was filed, the court will direct that it be released. See n.1, *supra*. With respect to the other cases, all portions of the memorandum and order in *TMI Coordinated Proceedings* apply except those dealing with the removal bonds.<sup>2</sup>

Accordingly, IT IS HEREBY ORDERED THAT:

1) the Clerk of Court is directed to release the removal bonds filed in CV-88-1550 and CV-88-1552; and

2) to the extent relevant, the memorandum and order dated March 16, 1990 in *TMI Coordinated Proceedings*, CV-88-1538, are adopted for purposes of these cases.

/s/ SYLVIA H. RAMBO

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Sylvia H. Rambo  
United States District Judge

Dated: March 16, 1990.

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2. These cases were removed after the changes to the removal procedures were made by the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988). Therefore, no bonds were required.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

<b>TMI COORDINATED</b>	:	<b>CIVIL ACTION</b>
<b>PROCEEDINGS</b>	:	<b>NO. 88-1538</b>
<b>This Memorandum Relates to</b>	:	
<b>All Actions <i>Except</i>:</b>	:	<b>(Judge Rambo)</b>
	:	
<b>CV-88-1676</b>	:	
<b>CV-88-1677</b>	:	

**MEMORANDUM**

Before the court are defendants' motion to release removal bonds and plaintiffs' motion to remand. With respect to the motion to release removal bonds, ten of seventeen plaintiffs' attorneys expressed nonconcurrence, but none filed an opposition to the motion. The plaintiffs' motion to remand, on the other hand, is opposed fiercely by defendants. This court held oral argument on the motion, permitted the United States to intervene in the action because the constitutionality of an Act of Congress affecting the public interest is at issue, *see* 28 U.S.C. § 2403(a), and received supplemental briefing from the United States and the plaintiffs. Both motions are ripe for disposition.

**Background**

On August 20, 1988, the Price-Anderson Amendments Act of 1988 (the Act) was enacted. The Act amended the Price-Anderson Act, 42 U.S.C. § 2210, which was originally enacted in 1957 as an amendment to the Atomic Energy Act of 1954. The Price-Anderson Act has been amended previously three times—in 1965, 1966 and 1975. The most recent amendments embodied in the Act provide for, among other things, removal to federal court of claims arising from any "nuclear incident." The relevant statutory provision, as revised by the Act, reads:

With respect to any public liability action aris-

ing out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on the date of the enactment of the Price-Anderson Amendments Act of 1988) [enacted Aug. 20, 1988] or United States district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States. In any action that is or becomes removable pursuant to this paragraph, a petition for removal shall be filed within the period provided in section 1446 of title 28, United States Code, or within the 30-day period beginning on the date of the enactment of the Price-Anderson Amendments Act of 1988 [enacted Aug. 20, 1988], whichever occurs later.

42 U.S.C.S. § 2210(n)(2) (Law. Co-op. Supp. 1989). The Act also adds a definition for "public liability action." 42 U.S.C.S. § 2014(hh) (Law. Co-op. Supp. 1989). That definition section also contains the provision which is at the heart of this most recent battle among the parties. That provision reads:

A public liability action shall be deemed to be an action arising under section 170, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

*Id.*

Within the thirty day period permitted, the defendants removed to this court most of the claims stemming from the 1979 accident at TMI. These claims are predominantly personal injury claims that were pending in the Court of Common Pleas in Dauphin County, Pennsylvania and in the Circuit Court of Jackson County, Mississippi. Additionally, there are two cases involving multiple plaintiffs alleging a loss in tourist business as a result of the 1979 TMI accident and a few cases that were pending in Lancaster, York, and Adams counties. Also removed were cases pending before the Pennsylvania Superior Court, which the Dauphin County Court of Common Pleas had dismissed on summary judgment. Also consolidated in these proceedings are two cases originally filed in the United States District Court for the Southern District of Mississippi. These two cases, however, are not covered by the scope of this memorandum.<sup>1</sup>

The plaintiffs filed their motion to remand contending first that Congress exceeded the scope of article III, section 2 of the United States Constitution (article III) by granting federal courts subject matter jurisdiction over the cases at bar through the Act. Plaintiffs also contend that the doctrines of separation of powers and federalism are violated by retroactively divesting state courts of jurisdiction of long-pending cases, that plaintiffs' due process rights are violated by allowing removal of cases they had properly filed and which

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1. These two cases, Nos. 88-1676 and 88-1677, originally were filed in the Southern District of Mississippi based upon diversity of citizenship jurisdiction. The cases were transferred to this court purportedly pursuant to both the Act and 28 U.S.C. § 1404 (change of venue). The cases were consolidated into these coordinated proceedings for purposes of plaintiffs' motion to remand. Since the consolidation, however, the Southern District of Mississippi court entered orders deleting the reference to the Act from the transfer orders. Therefore, these cases are here only because of 28 U.S.C. § 1404 venue considerations and, although consolidated in these proceedings, are not covered by the scope of this memorandum because this memorandum addresses only the challenge to jurisdiction over cases which are here by virtue of the Act.

had been pending in state court, and that equal protection is violated because the Act increases the compensation fund for similar cases to be filed in the future but does not increase that fund for pending cases. Defendants argue that the only questions ripe for resolution at this time are whether the Act's grant of jurisdiction violates article III and, if not, whether the retrospective grant of jurisdiction is proper. Nonetheless, defendants and the United States addressed plaintiffs' other arguments in their briefs. Of course, both the defendants and the United States take the position that the Act's grant of jurisdiction is appropriate in all respects.

Defendants subsequently filed their motion to release removal bonds. The court first will address the motion to release removal bonds and then will consider the motion to remand.

## **Discussion**

### **A. Defendants' motion to release removal bonds**

Defendants' motion to release removal bonds is based on the latest changes made to Sections 1446 and 1447 of Title 28 of the United States Code by the Judicial Improvements and Access to Justice Act (the Improvements Act), Pub. L. No. 100-702, 102 Stat. 4642 (1988). The Improvements Act, which went into effect after defendants' removal petitions and required bonds had been filed in these cases, eliminated the requirement that a bond accompany a removal petition and added a provision enabling courts to impose attorney fees as part of costs in conjunction with a remand. As noted above, only seven of seventeen attorneys for plaintiffs concurred in the motion but no briefs opposing the motion were filed. Therefore, the court deems the motion to be unopposed by the ten plaintiffs' attorneys who failed to file a brief. See Rule 401.6, Rules of Court for the United States District Court for the Middle District of Pennsylvania.

Even if the motion to release the removal bonds had been opposed properly, this court would be compelled to grant the motion. In *Air-Shields, Inc. v. Fullam*, 891 F.2d 63 (3d Cir.



1989), the Third Circuit encountered a similar situation in connection with another revision under the Improvements Act which had the effect of changing the law pertaining to removal while the case was pending. The court referred to *Bradley v. Richmond School Bd.*, 416 U.S. 696 (1973), in which "the Supreme Court held that 'even where the intervening law does not explicitly recite that it is to be applied in pending cases, it is to be given recognition and effect.'" *Air-Shields, Inc.*, 891 F.2d at 65 (quoting *Bradley*, 416 U.S. at 715 (citing *Thorpe v. Housing Auth.*, 393 U.S. 268 (1969))). The Third Circuit held that "the district court was obligated to proceed under the recently amended, rather than the 1982 version of [the law]." *Id.* In accordance with *Bradley* and *Air-Shields, Inc.*, this court finds that the Improvements Act's elimination of the bond requirement necessitates granting defendants' motion to release the removal bonds.

### **B. Plaintiffs' motion to remand**

The issue at the heart of plaintiffs' motion to remand is whether Congress exceeded the scope of article III by granting federal courts subject matter jurisdiction over the cases specified in the Act, *i.e.*, public liability actions. Of course, the other issues raised by the parties need only be addressed if this court finds Congress did not exceed the scope of article III.

Article III provides, in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ." U.S.C.S. Const., Art. III, § 2, c1.1 (Law. Co-op. 1986). It is "firmly establish[ed] that Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983). As the Court in *Verlinden* noted, "The controlling decision on the scope of Art. III arising under jurisdiction is Chief Justice Marshall's opinion for the Court in *Osborn v. Bank of United States*, 9 Wheat. 738 (1824)." *Id.* at 492. The Court in *Osborn* held that "it [is] a

sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law[s] of the United States, and sustained by the opposite construction." *Osborn*, 22 U.S. (9 Wheat) at 822. "*Osborn* thus reflects a broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law." *Verlinden*, 461 U.S. at 492. Both *Osborn* and *Verlinden* provide examples of well-reasoned application of the substantive law on the scope of article III "arising under" jurisdiction.

In *Osborn*, the Bank of the United States brought suit to enjoin Ohio from collecting a tax from the Bank. At issue was whether the act of Congress creating the Bank and granting its powers, including authorization "to sue and be sued . . . in any Circuit Court of the United States," 22 U.S. (9 Wheat.) at 816, was sufficient to confer "arising under" jurisdiction. The Court observed that the act chartering the Bank granted it all its rights and powers and that the Bank had no rights or powers apart from those conferred upon it by the act. The chartering act "bestow[ed] upon the being it has made, all the faculties and capacities which that being possessed. Every act of the Bank grows out of this law, and is tested by it. To use the language of the constitution, every act of the Bank arises out of this law." *Id.* at 827. Accordingly, the Court upheld the grant of jurisdiction.

In *Verlinden*, jurisdiction in the district court was based on the Federal Sovereign Immunities Act, 28 U.S.C. § 1330, which grants district courts subject matter jurisdiction over nonjury civil actions against foreign states. The Court held:

At the threshold of every action in a district court against a foreign state, . . . the court must satisfy itself that one of the exceptions [to immunity] applies—and in doing so it must apply the detailed federal law standards set forth in the Act. Accordingly, an action against a foreign sovereign arises under federal law, for purposes of Art. III jurisdiction.

*Id.* at 493-94. In reaching this conclusion, the Court noted that

“the primary purpose of the Act was to se[t] forth comprehensive rules governing sovereign immunity;” the jurisdictional provisions of the Act are simply one part of this comprehensive scheme. . . . The Act codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law, and applying those standards will generally require interpretation of numerous points of federal law. Finally, if a court determines that none of the exceptions to sovereign immunity applies, the plaintiff will be barred from raising his claim in any court in the United States—manifestly, “the title or right set up by the party, may be defeated by one construction of the . . . laws of the United States, and sustained by the opposite construction.”

*Id.* at 496-97 (citations omitted). The Court also recognized that in enacting the Foreign Sovereign Immunities Act, “Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 States.” *Id.* at 497.

In this case, the Act provides that public liability actions are deemed to “arise under” section 170 of the Atomic Energy Act of 1954 (42 U.S.C. § 2210). The law of the state in which the nuclear incident occurs will govern the rules for decision in such cases unless the applicable state law is inconsistent with section 170. Consequently, Congress has not “codifie[d] the standards” governing personal injury actions resulting from nuclear incidents “as an aspect of substantive federal law.” *Verlinden*, 461 U.S. at 497. On the contrary, this Act precludes a “standard” because of the variances in state tort laws. In *Verlinden*, it was apparent that Congress wanted all cases against foreign sovereigns to be resolved by application of a uniform set of substantive rules. With a “codified standard” such as that contained in the Foreign Sovereign Immu-

nities Act, the “potential for a multiplicity of conflicting results among the courts of the 50 States” truly is curtailed. *Id.* Under this Act, however, results will differ depending on the law of the state in which the nuclear incident forming the basis for the suit occurs.

Defendants contend that regardless of the fact that state substantive law governs, these actions “necessarily involve[ ] application of a body of substantive federal law.” *Id.* at 497; see Defendants’ Memorandum in Opposition to Plaintiffs’ Petition to Remand (Defendants’ Memorandum) at 13. The body of substantive federal law to which they refer is comprised of the Act itself and the Price-Anderson Act it amends. To illustrate their point, defendants use the example of plaintiffs seeking to recover for alleged increased risk of future injuries. Summarized, the argument is that a “public liability action” is one “asserting ‘public liability,’ ” 42 U.S.C.S. § 2210(hh) (Law. Co-op. Supp. 1989), which, in turn, is defined as “liability arising out of a ‘nuclear incident,’ ” 42 U.S.C.S. § 2210(w) (Law. Co-op. Supp. 1989), which is defined as “an occurrence causing bodily injury, sickness, disease or death.” 42 U.S.C.S. § 2210(q) (Law. Co-op. Supp. 1989). Determining whether recovery for alleged increased risk of future injuries qualifies as “bodily injury, sickness, disease or death,” defendants argue, “presents a federal question concerning the interpretation of a federal statute.” Defendants’ Memorandum at 14. However, because there are no substantive provisions in the federal statute pertaining to recovery for increased risk, the law of the appropriate state will provide the answer to this inquiry. There will be no need to interpret “numerous points of federal law” or to apply “a body of substantive federal law.” *Verlinden*, 461 U.S. at 497 (emphasis added).<sup>2</sup>

Moreover, the Act does not satisfy the standard set forth

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2. The court notes the Act’s prohibition of punitive damages awards “against a person on behalf of whom the United States is obligated to make payment under an agreement of indemnification.” 42 U.S.C. § 2210(s). This single provision, however, neither amounts to “a body of substantive federal law” nor requires “interpretation of numerous points of federal law.” *Verlinden*, 461 U.S. at 497.

in *Osborn*; here, "the right . . . set up by the party [will not] be defeated by one construction of the . . . law . . . and sustained by the opposite construction." *Osborn*, 22 U.S. (9 Wheat.) at 822. In *Osborn*, the Bank had no existence without the chartering act which provided for the Bank "to sue and be sued . . . in any Circuit Court of the United States." *Id.* at 816. The federal law provided the cause of action and that cause of action could be defeated depending upon construction of the federal law. Similarly, in *Verlinden*, the right to sue a foreign sovereign depended upon construction of the federal law created by the Foreign Sovereign Immunities Act. In cases brought pursuant to that act, if a court determined that none of the exceptions to sovereign immunity embodied in the federal standard were applicable, "the plaintiff [would] be barred from raising his claim in *any* court in the United States." *Verlinden*, 461 U.S. at 497 (emphasis added). Here, the right at issue is the right to bring an action for recovery of damages for alleged tortious injuries resulting from nuclear incidents. That right is created by state law and exists regardless of the provisions of the Act. Differing constructions of the Act would only affect the forum in which such an action is maintained. For example, if a federal court determined that a case did not qualify as a "public liability action," the case still could be brought in state court. The state court would apply the same substantive law that the federal court would have applied. The only difference would be the forum in which the case was tried. Quite simply, the right at issue here<sup>3</sup> is not susceptible to defeat by differing constructions of the Act.

Having considered the Act in light of *Osborn* and *Ver-*

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3. Contrary to defendants' assertions, this court does not believe that the right to receive a damages award from the compensation fund set up by the Act is the right to be analyzed in determining the constitutionality of the Act's grant of jurisdiction. In any event, although such a fund arguably makes it more convenient for plaintiffs to receive their awards and undoubtedly eases the financial burden of an assessment of damages upon individual defendants, the ability of plaintiffs to recover is not defeated without the existence of such a fund.

*linden*, this court finds that the Act's jurisdictional grant exceeds the bounds of article III. Given this conclusion, the other arguments addressed by the parties need not be considered.<sup>4</sup> Having found that the Act's jurisdictional grant exceeds the bounds of article III, this court lacks subject matter jurisdiction over the cases removed to this court pursuant to the Act. Therefore, those cases must be remanded to the appropriate state courts. *See* 28 U.S.C. § 1447(c).

### C. Reviewability of this court's decision

This court is well aware of the importance of the issue at bar to all parties involved. Therefore, it has considered the reviewability of its decision. Specifically, this court has considered certifying its decision for immediate appeal pursuant to 28 U.S.C. § 1292(b). Because this court's decision on the jurisdictional issue results in an order to remand, the question of reviewability must be considered in the context of the removal statute.

Title 28 U.S.C. § 1447(d) provides that, with the exception of civil rights cases removed pursuant to 28 U.S.C. § 1443, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." Although the language of § 1447(d) appears to completely prohibit any review of any remand order, limited exceptions have been made. For example, in *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), the Court held that an order remanding a case based on grounds not provided by § 1447 is reviewable by a petition for mandamus. *See id.* at 351-53. In reaching its holding, the Court stated, "There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, *United States v. Rice*, 327 U.S. at 751, Congress immunized from all forms of appellate review any remand order issued on the grounds specified in § 1447(c). . . ." *Id.* at 351. Consequently,

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4. To the extent defendants and the United States raised the ground of "protective jurisdiction" as an alternative argument for upholding the Act's grant of jurisdiction, this court rejects that argument for the reasons set forth in plaintiffs' reply briefs.



in *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, *reh'g denied*, 431 U.S. 975 (1977), the Court reversed the review by mandamus of a district court's remand order which was based on § 1447(c). *See id.* at 723-24. The *Gravitt* Court stated, "*Thermtron* did not question but re-emphasized the rule that § 1447(c) remands are not reviewable." *Id.* at 724.

Clearly, the decision to remand the cases at bar is based on § 1447(c). This court is unaware, however, of any Supreme Court or Third Circuit decision specifically addressing the question whether appellate review of certain district court remand orders issued pursuant to § 1447(c) is appropriate under § 1292(b) notwithstanding the general rule prohibiting review of such orders.<sup>5</sup> The Tenth Circuit addressed the question in *In re Bear River Drainage Dist.*, 267 F.2d 849 (10th Cir. 1959), and held that review pursuant to § 1292(b) was not available. The Ninth Circuit addressed the same question in *National Audubon Soc'y v. Department of Water*, 858 F.2d 1409 (9th Cir. 1988), and held that although remand orders are generally not appealable, certification under § 1292(b) permitted review. It should be noted that the Ninth Circuit in *Fed. Sav. and Loan Ins. Corp. v. Frument*, 857 F.2d 665 (9th Cir. 1988), decided about two weeks before *National Audubon Society*, reached a different result. There, FSLIC had obtained certification of the district court's order pursuant to § 1292(b), petitioned the Ninth Circuit for a writ of mandamus, and filed a regular appeal under § 1291. The court denied permission to appeal under § 1292(b), denied the petition for writ of mandamus and dismissed the appeal filed under § 1291.

This court's research has revealed one case in the Third Circuit specifically addressing a request to certify a § 1447(c) remand order under § 1292(b). In *Smith v. Thomas Jefferson Univ. Hosp.*, No. 88-7345 (E.D. Pa. August 7, 1989) (LEXIS,

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5. This court notes that in *Air-Shields, Inc.*, the Third Circuit quoted *Thermtron* for its "explan[ation] that 'only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d).'" *Air-Shields, Inc.*, 891 F.2d at 66 (quoting *Thermtron*, 423 U.S. at 346). However, the specific issue of the availability of review pursuant to § 1292(b) was not addressed.



Genfed library, Dist file), Chief Judge Fullam was requested to reconsider his order remanding the case to state court. He denied that motion. The movants had requested, in the alternative, certification for appeal under § 1292(b). The court noted that “[g]iven the general non-appealability of remand orders, see 28 U.S.C. § 1447(d), there is at least a serious question as to the availability of § 1292(b) relief in these circumstances.” That precise question was not resolved because the court, apparently assuming for purposes of argument that such relief was available, was “unable to conclude ‘that an immediate appeal from the order may materially advance the ultimate termination of the litigation,’ as required by [§ 1292(b)].” Therefore, the application for certification was denied.

Like Chief Judge Fullam in *Smith*, this court believes there is a serious question as to the availability of § 1292(b) relief under the present circumstances. That question, however, must be answered finally by the Third Circuit. Given the nature of the central issue in this case, this court believes review pursuant to § 1292(b) is warranted and that the issue meets the criteria of § 1292(b).

Certification of an order for immediate appeal under § 1292(b) requires a finding “that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C.S. § 1292(b) (Law. Co-op. 1986). In determining whether an order involves a controlling question of law,

[t]he key consideration is not whether the order involves the exercise of discretion, but whether it truly implicates the policies favoring interlocutory appeal. The determination . . . must be made by a practical application of those policies . . . [which] have included the avoidance of harm to a party pendente lite from a possible erroneous interlocutory order and the avoidance of possibly wasted trial time and litigation expense.

*Katz v. Carte Blanche Corp.*, 496 F.2d 747, 756 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974). If this court's determination that the Act's grant of jurisdiction exceeds the scope of article III is reviewed and found to be erroneous, the cases at bar will be tried in this court and the harm to defendants of denying them the right granted by Congress to be in federal court will be avoided. Review of this issue may also save the parties time and money. Although the decision reached by the court of appeals most likely will result in a petition for writ of certiorari to the Supreme Court, if the result of all review of this issue places the cases back in this court for trial, the termination of the litigation will be in sight. If this issue is not reviewed, however, given the history of these cases following the decisions in *Stibitz v. General Pub. Utils. Corp.*, 746 F.2d 993 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985), and *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490 (3d Cir. 1986), and defendants' strong desire to be in federal court, it is highly likely that there will be another amendment to the Price-Anderson Act to provide for federal jurisdiction over these cases. That undoubtedly would result in another battle for remand which would involve great expenditures of time and money.<sup>6</sup>

Another reason, and perhaps the most compelling, for considering the issue at bar a controlling question of law is because the constitutionality of an Act of Congress is being challenged. The final determination on this issue will impact not only the parties in the instant cases but also the parties to any similar cases that may arise in the future. This jurisdictional issue requires more than a simple determination of whether public liability actions "arise under" the Act. See Herrmann, *Thermtron Revisited: When and How Federal Trial Court Remand Orders are Reviewable*, 19 Ariz. St. L. J., 395, 414 & n.10 (1987-88). Rather, it involves a determination

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6. It should also be noted in this regard that review of the issue will not necessarily defeat the goal of § 1447(d) to prevent delay in the trial of remanded cases. As stated above, the history of these cases gives every indication that there will be further delay in the trial of these cases despite remand to state court.

as to whether the grant of "arising under" jurisdiction itself is constitutional. Certainly, the issue is "serious to the conduct of the litigation, [both] practically [and] legally." *Katz*, 496 F.2d at 755.

This court also believes there is a substantial ground for difference of opinion as to the correctness of its decision. The defendants and the United States presented strong and logical arguments for upholding the Act's jurisdictional grant. This court is not so bold as to state that its opinion on the constitutionality of an Act of Congress not previously reviewed by the courts is so plainly correct that it should not be reviewed by the appellate court.

Finally, with regard to materially advancing the ultimate termination of the litigation, this court admits, as noted above, that it is difficult to determine how that result would be accomplished most significantly. As stated previously, however, the result of appellate review of the issues at bar might prevent further delays caused by another attempt to amend the Price-Anderson Act. Therefore, this court believes appellate review of this issue is appropriate. Accordingly, this court will certify for immediate appeal under § 1292(b) the question of whether Congress exceeded the scope of article III, section 2 of the United States Constitution by granting federal courts subject matter jurisdiction over public liability actions in the Price-Anderson Amendments Act of 1988. Of course, this certification is made with the recognition that the court of appeals first will have to decide if review under § 1292(b) is even appropriate under these circumstances.

### Conclusion

Based upon the preceding discussion, this court will grant defendant's motion to release removal bonds. The court also finds that Congress exceeded the scope of article III by granting federal courts subject matter jurisdiction over public liability actions through the Act. As a result of that finding, this court is without jurisdiction over the cases consolidated in these proceedings by virtue of the Act and must remand them to the appropriate state courts. Because of the importance of this issue to the parties and the court's belief that this issue meets the criteria of 28 U.S.C. § 1292(b), however, the issue will be certified for immediate appeal pursuant to that section. Certification is made recognizing that the first question for appellate resolution will be whether § 1292(b) review is available under these circumstances.

An appropriate order will be issued.

/s/ SYLVIA H. RAMBO

Sylvia H. Rambo  
United States District Judge

Dated: March 16, 1990.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

<b>TMI COORDINATED</b>	:	<b>CIVIL ACTION</b>
<b>PROCEEDINGS</b>	:	<b>NO. 1:CV-88-1538</b>
<b>This Memorandum and Order</b>	:	
<b>Relates to All Actions Except:</b>	:	
	:	
<b>CV-88-1676</b>	:	
<b>CV-88-1677</b>	:	

**MEMORANDUM AND ORDER**

On March 16, 1990, this court entered an order finding that Congress exceeded the scope of article III, section 2 of the United States Constitution by granting federal courts subject matter jurisdiction over public liability actions through the Price-Anderson Amendments Act of 1988. This finding resulted in this court granting plaintiffs' motion to remand. Execution of the remand, however, was stayed because this court is of the opinion that its remand order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order might materially advance the ultimate termination of this litigation. Therefore, the court certified for immediate appeal pursuant to 28 U.S.C. §1292(b) the issue of whether Congress exceeded the scope of article III, section 2 of the United States Constitution by granting federal courts subject matter jurisdiction over public liability actions through the Price-Anderson Amendments Act of 1988.

Plaintiffs filed a motion for partial reconsideration of this court's March 16, 1990 order. The defendants filed responses to the motion and the plaintiffs have replied. A motion for reconsideration also was filed by the United States. No separate supporting brief was filed by the United States within the time provided by the Local Rules of this court. Plaintiffs then filed a motion to strike the United States' motion for reconsideration. The United States responded to that motion by

arguing that its motion evidently contained the grounds upon which it was relying and that its brief merely would contain the same text with a different caption. The plaintiffs did not reply and that motion became ripe on May 25, 1990.

The court notes that plaintiffs were aware of both the basis for the United States' motion and the fact that the United States intended its motion to be considered a motion and brief. *See* Opposition of the United States to Plaintiffs' Motion to Strike. Additionally, plaintiffs addressed the merits of the United States' motion for reconsideration in their reply to the United States' opposition to their motion for partial reconsideration. Therefore, the motion to strike will be denied and the court will dispose of the United States' motion for reconsideration without further argument from the parties.

The plaintiffs' and the United States' motions for reconsideration are similar in that they both ask this court to retract its March 16, 1990 ruling to a certain degree. The plaintiffs seek the court to vacate the certification of the issue pursuant to 28 U.S.C. §1292(b) and the stay of the remand. The United States asks the court to delete from its memorandum and order any reference to remand.

The plaintiffs argue that certification for immediate appeal of an issue involving a remand and staying the remand is erroneous. The cases cited by plaintiffs were discussed by this court in its Memorandum. The court is not persuaded by plaintiffs' argument and will deny their motion for partial reconsideration for the reasons stated in Section C of the March 16, 1990 Memorandum.

The United States would have this court stop short of applying its opinion on the constitutionality of the Price-Anderson Amendments Act to the motion to remand which raised the issue. This, the United States suggest, would remove a possible barrier to appeal. The plaintiffs argue that following that course would result in a decision on the constitutionality of an act of Congress being made, in effect, in a vacuum. The court agrees with the plaintiffs in this regard and will refrain from issuing an advisory opinion. In this case, the decision on the constitutional issue is extricably linked to

the decision on the remand motion. This court recognized that certifying this constitutional issue for immediate appeal would require the Court of Appeals to first determine whether that issue could be reviewed in the context of a remand. This court's reasons for certifying the issue are set forth in its March 16, 1990 Memorandum and need not be repeated here. The United States' proposed course of action in this matter appears inappropriate. Therefore, the United States' motion for reconsideration will be denied.

Accordingly, IT IS ORDERED THAT:

- 1) plaintiffs' motion for partial reconsideration is denied;
- 2) plaintiffs' motion to strike the United States' motion for reconsideration is denied; and
- 3) the United States' motion for reconsideration is denied.

/s/ SYLVIA H. RAMBO

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Sylvia H. Rambo  
United States District Judge

Dated: June 14, 1990.



**U.S. Const., Art. III****Section 2, Clause 1. Jurisdiction of Courts**

**Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

\* \* \*

**42 U.S.C. § 2014(hh)** The term “public liability action”, as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

\* \* \*

**42 U.S.C. § 2210(n)(2)** With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission, or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on August 20, 1988) or United States

district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States. In any action that is or becomes removable pursuant to this paragraph, a petition for removal shall be filed within the period provided in section 1446 of Title 28, or within the 30-day period beginning on August 20, 1988, whichever occurs later.

\* \* \*

**28 U.S.C. § 1447(c)** A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

\* \* \*

**28 U.S.C. § 1447(d)** An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.



JAN 10 1992

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IN THE  
**Supreme Court of the United States**  
 OCTOBER TERM, 1991

JOHN W. GUMBY, SR., et al.,

*Petitioners,*

v.

GENERAL PUBLIC UTILITIES CORPORATION, METROPOLITAN  
 EDISON CO., JERSEY CENTRAL POWER AND LIGHT CO.,  
 PENNSYLVANIA ELECTRIC CO., BABCOCK & WILCOX CO.,  
 McDERMOTT INC., U.E. & C.-CATALYTIC, INC., BURNS &  
 ROE ENTERPRISES, INC., AND DRESSER INDUSTRIES INC.,

*Respondents.*

Petition for a Writ of Certiorari to the United States  
 Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO  
 PETITION

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## QUESTIONS PRESENTED

1. Did Congress intend, in 28 U.S.C. § 1447(d), to make federal district courts final arbiters of the constitutionality of federal jurisdictional statutes?

2. Does the "arising under"-clause of Article III of the Constitution prevent Congress from granting district courts jurisdiction over a federal right of action intended to replace state remedies for the compensation of persons injured by nuclear power plant accidents, when Congress directs the courts to derive the rules of decision for that federal right of action from substantive state law to the extent not inconsistent with the federal compensation scheme?

3. May Congress constitutionally authorize removal to district court of public liability actions that were pending in state courts when Congress enacted the removal authority?

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1991

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**No. 91-676**

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JOHN W. GUMBY, SR., *et al.*,

*Petitioners,*

v.

GENERAL PUBLIC UTILITIES CORPORATION, METROPOLITAN  
EDISON CO., JERSEY CENTRAL POWER AND LIGHT CO.,  
PENNSYLVANIA ELECTRIC CO., BABCOCK & WILCOX CO.,  
McDERMOTT INC., U.E. & C.-CATALYTIC, INC., BURNS &  
ROE ENTERPRISES, INC., AND DRESSER INDUSTRIES INC.,

*Respondents.*

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**Petition for a Writ of Certiorari to the  
United States Court of Appeals for the  
Third Circuit**

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**BRIEF OF RESPONDENTS IN OPPOSITION TO  
PETITION**

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Respondents General Public Utilities Corporation,  
*et al.*,<sup>1</sup> defendants in these public liability actions un-

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<sup>1</sup> Respondents are General Public Utilities Corp., Metropolitan Edison Co., Jersey Central Power & Light Co., Pennsylvania Electric Co., Babcock & Wilcox Co., McDermott Incorporated, U.E. & C.-Catalytic, Inc., Burns & Roe Enterprises, Inc. and Dresser Industries, Inc. The information required by Supreme Court Rule 29.1 regarding each of the Respondents is set forth in Respondents' Appendix at 39a-41a.

der the Atomic Energy Act, as amended by the Price-Anderson Act, and appellants in the court below, submit this brief in opposition to the petition for a writ of certiorari.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth in Petitioners' Appendix, the provisions of 42 U.S.C. §§ 2012-14 and 2210 are involved in this case and are set forth in their entirety in Respondents' Appendix at 1a-38a.

## STATEMENT

### A. The Present Litigation.

The present cases arise out of the March 28, 1979 accident at Unit 2 of the Three Mile Island nuclear generating station ("TMI"). This accident led to the first and to date the only major litigation under the financial protection provisions of the Price-Anderson Act, Pub. L. 85-256, 71 Stat. 576 (1957), which amended the Atomic Energy Act of 1954. Since the TMI accident, over 2000 plaintiffs have filed suit in over 200 actions in state and federal courts in Pennsylvania, Mississippi and New Jersey.

Most of the present cases are personal injury claims; some allege economic injuries such as loss of tourism revenues. A-38. In the Price-Anderson Amendments Act of 1988 (the "Amendments Act"), Congress, *inter alia*, provided a specific statutory basis for original and removal jurisdiction over cases arising out of nuclear incidents such as the one at TMI. Pub. L. 100-408 § 11(a), 102 Stat. 1076 (1988) (codified at 42

U.S.C. § 2210(n)(2)). Congress made the removal jurisdiction applicable to pending cases and, pursuant to and in conformance with the Amendments Act, the present cases were removed from state courts and consolidated in the United States District Court for the Middle District of Pennsylvania. A-146.

The district court held that it was without removal jurisdiction because the Amendments Act did not satisfy Art. III "arising under" jurisdiction. The Third Circuit reversed, and Petitioners did not seek rehearing or rehearing *en banc*.

**B. The Public Liability Action Under The Atomic Energy Act, As Amended By The Price-Anderson Act.**

Although the Art. III question Petitioners present would require consideration of the federal ingredients in a congressionally defined cause of action, the "public liability action," the Petition contains no description of the comprehensive and unique regulatory scheme of which that private right of action is a part.

In 1954, with the passage of the Atomic Energy Act, Congress ended the legal monopoly of the federal government over production and use of nuclear fuels. Congress' purpose in doing so was "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes. . . ." 42 U.S.C. § 2013(d). But it quickly became apparent that private investment would not be forthcoming if there were no limits on potential liability. S. Rep. No. 296, 85th Cong., 1st Sess. 1, *reprinted in* 1957 U.S.C.C.A.N. 1803. The Price-Anderson Act was designed "to remove the economic impediments in order to stimulate the private development of electric energy by nuclear power while simultaneously providing



the public compensation in the event of a catastrophic nuclear incident." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83 (1978); see also *id.* at 63-67.

Congress mandated that licensees of commercial nuclear power reactors be capable, through private insurance or by other financial means, of responding to claims for damages arising out of a nuclear incident, up to federally specified limits. 42 U.S.C. § 2210(b). "Nuclear incident" was defined to cover any injuries "arising from the special dangerous properties" that made nuclear risk a subject of federal regulation. S. Rep. No. 296, 85th Cong., 1st Sess. 16, reprinted in 1957 U.S.C.C.A.N. at 1817; see 42 U.S.C. § 2014(q).

Congress recognized that a nuclear incident might be caused by any of a number of participants in the nuclear industry. Congress did not want compensation to be hampered by the complications likely to ensue if multiple defendants, each with its own insurer, were actively defending. In a "significant departure from normal tort law precepts," H.R. Rep. 104, 100th Cong., 1st Sess., pt. 3, at 16 (1987), Congress, through mandatory indemnification provisions, channelled all public liability to licensees, and away from non-licensees who might otherwise have borne such liability under ordinary tort law. See 42 U.S.C. §§ 2014(t), 2014(w), 2210(a).<sup>2</sup> The channelling provisions alter the

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<sup>2</sup> Congress recognized that the channelling provisions would protect even a complete stranger to the industry who causes a nuclear incident, such as an errant pilot. *Governmental Indemnity and Reactor Safety: Hearings Before the Joint Comm. on Atomic Energy*, 85th Cong., 1st Sess. 20, 109, 114-15, 165 (1957).

ordinary congruence in tort law between causing and bearing liability.<sup>3</sup>

If a nuclear incident caused damages in excess of the financial protection required of the licensee, the federal government indemnified anyone who was liable up to a specified limit. 42 U.S.C. § 2210(c). All public liability growing out of a single nuclear incident was capped at the total of the financial protection and the indemnification. 42 U.S.C. § 2210(e). The government's potential indemnification liability for TMI public liability is \$85 million.

After passage of the Price-Anderson Act, Congress continued to refine the compensation provisions over a thirty year period. In 1966, dissatisfied with substantive state tort law, Congress authorized the Nuclear Regulatory Commission ("NRC") to require licensees to waive negligence and other defenses in the event of an extraordinary nuclear occurrence ("ENO"), and conferred federal jurisdiction over claims for public liability arising out of such an occurrence.<sup>4</sup> Congress also authorized federal courts to formulate an equitable distribution plan whenever the federally mandated funds may constitute a limited fund because the federal liability limits may be exceeded. 42 U.S.C. § 2210(o). In 1975, Congress mandated a second tier of private insurance, to be funded by deferred premiums paid by all licensees of nuclear

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*See also* S. Rep. No. 296, 85th Cong., 1st Sess. 17, *reprinted in* 1957 U.S.C.C.A.N. at 1818-19.

<sup>3</sup> All but one of the defendants in these cases are non-licensees.

<sup>4</sup> The NRC has determined that the TMI accident was not an ENO. *See Stibitz v. General Pub. Utils. Corp.*, 746 F.2d 993, 996 n.3 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985).

power reactors, if and when required. 42 U.S.C. § 2210(b). This retrospective premiums obligation constitutes a federally mandated industry-wide shared liability rule. Congress also committed itself to further compensation in the event damages exceeded the cap on public liability. 42 U.S.C. § 2210(e).

In 1988, in the Amendments Act, Congress addressed the problem of the nuclear incident that gives rise to multiple claims but is not an ENO. Congress adopted a national policy of uniform treatment for all persons injured in a single nuclear incident. *See* H.R. Rep. No. 104, 100th Cong., 1st Sess., pt. 1, at 18 (1987) (“desire of Congress for equitable and uniform treatment of victims of a nuclear accident”); *see also* A-88, A-98 to A-99. The Amendments Act creates a federal cause of action, the “public liability action,” which encompasses “any suit asserting public liability,” 42 U.S.C. § 2014(hh);<sup>5</sup> confers original and removal jurisdiction for public liability actions arising out of a given nuclear incident on a single federal district court—the district court in the district where the nuclear incident occurred, 42 U.S.C. §§ 2014(hh), 2210(n)(2); and directs that the “substantive rules for decision” in public liability actions “shall be derived from the law of the State in which the nuclear incident involved occurs” unless the state law is “inconsistent” with the compensation provisions of the Act. 42 U.S.C. § 2014(hh).

In the Amendments Act, Congress also enacted special case management and consolidation authorities

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<sup>5</sup> “Public liability” is separately defined as “any legal liability arising out of or resulting from a nuclear incident . . . .” 42 U.S.C. § 2014(w) (emphasis added).

for the federal district court, and authorized the adoption of special procedural rules to expedite cases or to allow more equitable consideration of claims. 42 U.S.C. § 2210(n)(3).<sup>6</sup>

#### C. The Three Decisions Prior To The 1988 Amendments.

The TMI litigation gave rise to three Third Circuit decisions prior to the Amendments Act, when Congress had not yet obviated application of the statutory “well-pleaded complaint” requirement under 28 U.S.C. § 1331.<sup>7</sup> None of the three cases addressed any constitutional issue under Art. III, and none was reviewed by this Court.

#### D. The Decision Below.

The district court found Art. III “arising under” jurisdiction lacking because Congress had not codified the substantive standards of liability for public liability actions. A-152. The district court stayed its remand order, however, and certified the Art. III question via 28 U.S.C. § 1292(b).

The Third Circuit entertained the Section 1292(b) appeal and reversed the district court’s constitutional

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<sup>6</sup> Contrary to the impression left by the Petition that only the Respondents went before Congress to seek the Amendments Act, (see Pet. 5-6, 12), the “decision to expand the jurisdictional grant was based upon [testimony by] [a]ttorneys representing both plaintiffs and defendants in the TMI litigation . . . that the ability to consolidate claims in federal court would greatly benefit the process for determining compensation for claimants . . . .” A-79 n.18 (quoting S. Rep. No. 218, 100th Cong., 2d Sess. 13 (1988)) (emphasis added).

<sup>7</sup> *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490 (3d Cir. 1986); *Stibitz*, 746 F.2d 993; and *Pennsylvania v. General Pub. Utils. Co.*, 710 F.2d 117 (3d Cir. 1983).

determination. The court first addressed whether the district court's decision to remand was reviewable at all, in view of the bar on review of remand orders in 28 U.S.C. § 1447(d). Following this Court's decision in *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 346 (1976), the court analyzed whether the district court's decision rested upon the ground specified in 28 U.S.C. § 1447(c), "lack[] [of] subject matter jurisdiction." Here, the district court's remand rested "solely on its determination that Congress exceeded its constitutional authority" when it made the grant. A-57 (emphasis in original). Such a constitutional determination, the court found unanimously, "was not the type of federal subject matter jurisdictional decision intended to be governed" by Section 1447(d). A-58. The court declined to attribute to Congress an intent to make federal district courts the "final arbiters of the constitutionality" of federal jurisdictional statutes. A-61; see also A-66.<sup>8</sup>

The opinion for the court begins its examination of the Art. III question with the "central teaching" of *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824), reiterated and applied in *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), and *Mesa v. California*, 489 U.S. 121 (1989), that a statute does not come within the Art. III "arising under" jurisdiction if it is "nothing more than a jurisdictional grant." A-70; see also *id.* at A-70 to A-75. In the

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<sup>8</sup> Thus, contrary to the "floodgates" assertions in the Petition, the Court of Appeals did not create an exception from 28 U.S.C. § 1447(d) for any case certified under 28 U.S.C. § 1292(b), or for any case involving any kind of constitutional issue. Rather, the Court of Appeals carefully constricted its limiting interpretation of § 1447(d). See Argument section I, *infra*.

Amendments Act, Congress did more than confer jurisdiction: "Congress intended to—and did—create a federal cause of action which will implicate substantive aspects of federal law." A-82. "At the threshold of every action asserting liability growing out of a nuclear incident . . . is a federal definitional matter to be resolved: Is this a public liability action?" A-83. A claim growing out of a "nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all.*" *Id.* (emphasis in original). "[N]o state cause of action based upon public liability" any longer exists. *Id.*

Relying on text and legislative history, the court found that in a public liability action, "state law provides the content of and operates as federal law." A-85. Nothing in the case law supports the proposition that "Congress may not constitutionally rely upon state rules of decision as a foundation for a particular statutory scheme." A-83.

In the alternative, even if "it is state law itself, rather than state law operating as federal law, which forms the basis for decision in public liability actions" (A-87), the "federal elements involved in the Price-Anderson scheme are . . . sufficient" to satisfy Art. III. A-88. "Congress has placed an overlay of federal law upon the rights and remedies previously available under state law." A-91. The federal overlay is in various provisions of the compensation scheme of the Price-Anderson Act (*see id.*), and in the pervasive safety regulation of nuclear activities under the Atomic Energy Act. Given the preemption of the field of nuclear safety regulation found by this Court in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 212



(1983), the duty of care owed by defendants to plaintiffs in public liability cases is "dictated" by federal safety regulations. A-91, A-95 to A-96. "[I]mportant federal questions" are "indispensable ingredients of the public liability action." A-96.<sup>9</sup>

As did the majority, the concurring opinion sustains the statute without reliance on any theory of "protective jurisdiction." A-96 n.23, A-102 (concurring opinion). A jurisdictional grant "must rest on more than a belief that a federal forum would be fairer or more efficient." A-137.

The concurrence upholds the statute under a constitutional standard explicitly designed to avoid the broadest implications of *Osborn*, under which the mere possibility of federal issues arising might suffice. See A-117 to A-118. The concurring opinion examines (a) the "likelihood that substantive federal issues will arise in a particular class of cases," A-117; and (b) whether original jurisdiction, as against removal or appellate jurisdiction, is important to the accomplishment of Congress' substantive purposes. A-117 to A-118, A-137. Applying that test, the concurrence concluded that "the rationale for permitting original federal jurisdiction is at least as strong here as it was in *Verlinden*." A-138.

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<sup>9</sup> The concurrence recognized that federal safety regulations "will play an integral role in a large proportion" of public liability actions. A-123. The court below did not address the extent to which the federal "overlay" may affect other elements of the cause of action, such as whether strict liability applies; proximate cause; the measure of damages for the types of injuries enumerated in the definition of "nuclear incident;" affirmative defenses; the duty to mitigate; and burdens of proof.



Having sustained the constitutionality of the jurisdictional grant, the majority and concurrence agreed that the Amendments Act's "provision for retroactivity was rationally directed to a legitimate federal concern." A-99, A-100 (concurring opinion).

## **REASONS FOR DENYING THE WRIT**

### **I. THE REVIEWABILITY ISSUE DOES NOT WARRANT REVIEW.**

As the court of appeals observed, the 1447(d) issue in this case is "unique. No case interpreting the reach of section 1447(d) has addressed the particular constitutional dilemma presented here." A-53. Congress enacted the predecessor to Section 1447(d) over a century ago, in 1887. Petitioners cite no case, and Respondents have found none, presenting the question presented here—whether Section 1447(d) bars all review where a district court remands because it finds the statute granting it jurisdiction to be unconstitutional under Art. III. "Never before," as Petitioners themselves observe, has an Art. III issue been presented to this Court in "the procedural posture presented by this case." Pet. 2.

There is no reason to believe that this novel issue of reviewability under Section 1447(d) will recur with any frequency in the future. For this 1447(d) issue to arise, (a) a case must come to the district court by way of removal, (b) the district court must determine that an express statutory grant of jurisdiction is unconstitutional under Art. III, which is itself a very rare occurrence, and (c) the Art. III determination must be the sole ground for remand (as was

the case here, A-57).<sup>10</sup> It is not surprising that this issue of reviewability has never before arisen, and indisputable that it is unlikely to arise with any frequency in the future. Despite Petitioners' alarm, the careful resolution by the court below of this narrow and unprecedented issue has not "rendered meaningless the appellate review prohibition of § 1447(d)." Pet. 8.<sup>11</sup>

As the issue has not arisen before, there is no conflict between the decision below and any decision of this Court or of any other circuit. In particular, and contrary to the Petitioners' assertion (Pet. 9, 11), there is no conflict with this Court's decision in *Thermtron*, 423 U.S. 336. The remand order in *Thermtron* was not based on a constitutional ground, and the Court in fact reviewed (and reversed) the remand order. See 423 U.S. at 343-44, 351. Similarly,

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<sup>10</sup> If there is an independent and sufficient non-Art. III ground for a remand, a court of appeals would not review any Art. III issue even in the rare case where such an issue is present. Occasionally, district courts do remand upon grounds not enumerated in § 1447(c), for example, contractual waivers of the right to remand, or procedural defects not contemplated by that section. Such remands have been held to be reviewable. See A-49 to A-53.

<sup>11</sup> Petitioners make a far-fetched prediction that confusion over when a remand order presents a question of "constitutional proportion" could cause "countless appeals" and delay "thousands of cases." Pet. 11. In the extremely rare case where a remand order purports to rest upon an Art. III determination about a jurisdictional statute, that fact will be evident. If the remand order does not purport to rest upon an Art. III determination, the decision below will have no bearing. Contrary to the loose description in the Petition (at 3, 11), the holding below has nothing to do with questions of "constitutional proportion" not involving application of Art. III to a jurisdictional statute.

Petitioners' assertion of conflict with other circuits is inaccurate. None of the three cases cited by Petitioners involved a remand based on a determination by the district court that the grant of jurisdiction was unconstitutional.<sup>12</sup>

The court's resolution of the 1447(d) issue was the correct one. In *Thermtron*, this Court found that Congress did not intend "to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute." *Thermtron*, 423 U.S. at 351. It is at least equally unlikely that Congress conferred carte blanche authority on district courts to "revise" removal statutes by striking them down as unconstitutional.<sup>13</sup> Petitioners'

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<sup>12</sup> See Pet. 10-11, citing *Federal Sav. & Loan Ins. Corp. v. Frumentis Dev. Corp.*, 857 F.2d 665 (9th Cir. 1988); *Richards v. Federated Dept. Stores, Inc.*, 812 F.2d 211 (5th Cir.) (per curiam), cert. denied, 484 U.S. 824 (1987); and *In re Bear River Drainage Dist.*, 267 F.2d 849 (10th Cir. 1959). The Petition cites *Richards* as recognizing that review is precluded even where constitutional determinations are made by the district court. Pet. 10. But the reference to "constitutional infirmities" in that case was dictum in a two paragraph per curiam order, and says nothing about how the Fifth Circuit would have decided this case. That the courts of appeals in *Frumentis* and *Bear River* declined to review questions that had been certified under § 1292(b) does not place those cases in conflict with the decision here. Petitioners are simply wrong in asserting that the decision below categorically "except[ed] interlocutory review" from § 1447(d). See Pet. 8. The dispositive element here was that the district court's decision to remand rested upon its determination that the statute granting jurisdiction was itself unconstitutional.

<sup>13</sup> Petitioners attempt to draw support from the repeal of 28

(continued)

interpretation can be sustained only through the "woode[n]" reading that this Court explicitly rejected in *Thermtron*, 423 U.S. at 352.<sup>14</sup>

## II. THE ART. III ISSUE DOES NOT WARRANT REVIEW.

### A. The Decision Below Applied Traditional Principles To A Distinctive Federal Statute; It Is Not In Conflict With Any Other Decision.

This case involves the application of Art. III to a highly particularized federal statute. The Petition does not contain even a suggestion of conflict among lower courts concerning the Art. III issue, and there is in fact no conflict. Apart from the decision below, three lower court decisions have addressed the jurisdiction of district courts over cases arising out of nuclear incidents. Two were decided in the Third Circuit, prior

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U.S.C. § 1252 (Pet. 10), but that statute, which authorized direct appeal to this Court of lower court decisions holding acts of Congress unconstitutional where the United States was a party, is irrelevant to the reviewability issue here. Indeed, in repealing, Congress affirmed the importance of "[p]rompt correction or confirmation of lower court decisions invalidating acts of Congress" through discretionary review. H.R. Rep. No. 660, 100th Cong., 2d Sess. 10 n.24, *reprinted in* 1988 U.S.C.C.A.N. 766, 776 n.24.

<sup>14</sup> Petitioners miss the point of the holding below (and of the reasoning in *Thermtron*) when they argue that because Congress has in various other statutes created exceptions to the bar in § 1447(d), no review should have been available here. Pet. 9 n.3. Since this remand was not within the statutory bar, no statutory exception to the bar was necessary. *See* A-67 n.10. Moreover, the argument makes sense only if Congress is held to assume that its acts are likely to be deemed unconstitutional, thus requiring provision for this likelihood. The presumption is, of course, the opposite. Acts of Congress are presumed to be constitutional.

to the Amendments Act, under the general federal question statute, 28 U.S.C. § 1331.<sup>15</sup> Neither addressed Art. III. The third was a more recent decision by a district court which upheld the constitutionality of the Amendments Act. *O'Conner v. Commonwealth Edison Co.*, 770 F. Supp. 448 (C.D. Ill. 1991).<sup>16</sup>

The decision below is not in conflict with any decision of this Court, nor does it apply any new Art. III "arising under" principles. Both the majority and the concurrence declined to rely on any theory of "protective jurisdiction." The majority's analysis "depends entirely" (A-75) upon an application of the "central teaching" of *Osborn*, "clarified" in *Verlinden* (A-70) and recently "reiterated" in *Mesa* (A-72), that "a case cannot be said to arise under a federal statute . . . that . . . is nothing more than a jurisdictional grant." A-70. The concurrence develops a two-step analysis explicitly designed to limit, rather than extend, the broadest implications of the *Osborn* decision. A-117 to A-119.

Applying *Osborn* and *Verlinden*, the majority's analysis turns on its determinations concerning the sta-

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<sup>15</sup> *Kiick*, 784 F.2d 490; *Stibitz*, 746 F.2d 993. It is noteworthy that in *Stibitz*, in the context of its ruling on the application of the well-pleaded complaint rule prior to the Amendments Act, the Third Circuit recognized that federal questions may well arise in the course of public liability litigation. 746 F.2d at 996.

<sup>16</sup> The district court in *O'Conner* reasoned that "under certain circumstances . . . Congress has the power to incorporate state law as federal law so that state law is essentially federalized." 770 F. Supp. at 452. Further, "even if the state rules of decision which are incorporated in 'public liability actions' . . . would not be regarded as federal law . . . Article III nonetheless authorizes federal jurisdiction given the extensive federal questions inherent in cases litigated under this Act." *Id.*

tutory scheme of which the jurisdictional grant is only a small part. The majority finds, for example, that injuries arising from "nuclear incidents" are compensable via the federal public liability action or not at all (A-83); at the "threshold" of every such action is a "federal definitional matter" (*id.*); Congress intended that the rules of decision derived from state law "constitute federal law" (A-87); even if Congress did not intend that state law operate as federal law, Congress effectuated its purposes by creating an "overlay of federal law" which alters a number of "rights and remedies previously available under state law" (A-91); in particular, "the duty the defendants owe the plaintiffs in tort is dictated by federal law." *Id.*<sup>17</sup> Given the court's statutory conclusion that "there are important federal questions to be resolved which are indispensable ingredients of the public liability action" (A-96), the court was hardly breaking new constitutional ground in holding that Congress did not exceed its constitutional authority when it conferred federal jurisdiction over public liability actions. Petitioners' real quarrel is thus not with the Art. III determination below, but with the court's conclusions regarding the operation and effect of the underlying Price-Anderson Act. These conclusions, of course, are specific to the Price-Anderson Act, and do not warrant certiorari review.

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<sup>17</sup> For example, pursuant to authority extended by Congress to the NRC and transferred to the Environmental Protection Agency, *see* 39 Fed. Reg. 24,936 (1973), the EPA promulgates regulations controlling permissible radiation exposures to persons off-site from operations at a licensed reactor. *See* 40 C.F.R. § 190.10. On-site exposures, which may also give rise to a public liability claim, are subject to the permissible dose limits set by the NRC. *See* 10 C.F.R. § 20.



**B. The Court Of Appeals Correctly Decided The Art. III Issue.**

Petitioners' contention that this case tests the "limits" of Art. III (Pet. 12) rests on two inaccurate assertions about the Amendments Act: that Congress did nothing more to satisfy Art. III than enact an "incantation of the magical words—'arising under'" (*id.* at 13) and that Congress did "nothing more than . . . attempt to adopt state law as federal law." *Id.* Both of these assertions ignore the statute and the extensive statutory analysis by the court below. Petitioners never do address the constitutionality of the statute that Congress actually enacted.

Petitioners' argument further proceeds in part from the irrelevant proposition that, prior to the Amendments Act, their claims had been determined by *Stibitz* and *Kiick* to be "state law claims." But neither *Stibitz* nor *Kiick* addressed the nature of Petitioners' claims in the context of the Amendments Act. Rather, both decisions were based on the well-pleaded complaint rule and its application to the determination that federal question jurisdiction was lacking under 28 U.S.C. § 1331.

Moreover, while the Petition asserts that there must be some "federal ingredient in the Petitioners' claims" (Pet. 12), *Mesa v. California* instructs that that premise is faulty. *Mesa* holds that constitutional "arising under" jurisdiction exists over state tort claims if a colorable federal defense is presented. 489 U.S. at 136-37. *See also Osborn*, 22 U.S. at 822.

Petitioners insist that the Amendments Act is a "mere jurisdictional grant" and therefore "constitutionally deficient." Pet. 12. In enacting a purely ju-



risdictional statute, however, Congress does “not intend to exercise its power to regulate commerce; nor to derive its authority from that article of the Constitution.” *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 452 (1852). Instead, Congress relies solely upon its authority to constitute inferior federal courts. *Id.* at 451.

When Congress enacted the Price-Anderson Act, which the Amendments Act amends, it expressly exercised Art. I powers other than its power to constitute inferior federal courts. *See* 42 U.S.C. §§ 2012, 2013(d); S. Rep. No. 296, 85th Cong., 1st Sess. 15, *reprinted in* 1957 U.S.C.C.A.N. at 1816. “The liability-limitation provision [is] a classic example of an economic regulation . . . .” *Duke Power*, 438 U.S. at 83. Congress’ exercise of substantive Art. I powers supports Art. III “arising under” jurisdiction. *Verlinden*, 461 U.S. at 496 (“Congress expressly exercised its power to regulate foreign commerce”).

Moreover, unlike the statute in *Propeller Genesee*, Congress did not simply say that federal courts have jurisdiction over torts arising out of nuclear incidents. Rather, “the jurisdictional provisions of the Act are simply one part of [a] comprehensive scheme,” *Verlinden*, 461 U.S. at 496, in this case a federal scheme of compensation and safety regulation. Under this comprehensive scheme, there is more than a “mere speculative possibility that a federal question may arise at some point in the proceeding.” *Id.* at 493.

By statute, the starting point of any public liability action must be the federal statutory question, is this case one claiming compensation for “bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of

or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material." (Definition of "nuclear incident" at 42 U.S.C. § 2014(q)). If not, then the action is not a "public liability action" and no part of the Price-Anderson Act, including its jurisdictional provisions, applies. Plaintiff has his ordinary state tort remedies which he may pursue in the ordinary way.

But if the action is one seeking compensation as a result of a "nuclear incident" as defined (i.e., as a result of the nuclear risk which was the subject of Congress' concern), then it is a "public liability action." See 42 U.S.C. §§ 2014(w), 2014(hh). From that determination flow a number of consequences having far more than mere jurisdictional significance. These non-jurisdictional consequences follow whether the public liability action is in federal or state court.

First among these is that any judgment, state or federal, will be satisfied from the funds in the mandated financial protection system, rather than from the assets of individual defendants, and total public liability is subject to a federal ceiling. These provisions remove the risks characteristic of ordinary tort law that a plaintiff will be unable to recover on a judgment, and that a defendant will sustain a bankrupting liability. Second, whether the suit is in federal or state court, licensees bear the financial responsibility for "public liability," even if they are not the cause of the injury, and non-licensees may not be held financially responsible, even if they are the cause. Cf. *Verlinden*, 461 U.S. at 496-97 (the Foreign Sovereign Immunities Act "governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state"). The deter-

rence role of ordinary tort law is thus altered. Indeed, liability that reaches the second tier of financial protection, funded by the retrospective premiums, would be borne by all federal licensees. The retrospective premiums provisions thus create an industry-wide shared liability rule.

Furthermore, given the dual investment and compensation objectives of the Price-Anderson Act, a plaintiff may not simply choose to "waive" the federal compensation scheme and pursue his traditional state law remedies. One of the principal purposes of the Price-Anderson Act was to remove the disincentive to participation in the nuclear power program identified when the Act was initially adopted. In order to achieve that purpose, Congress made the decision to insulate the assets of those participating in the industry from tort suits, and to replace that source of funds with the "financial protection system" of the Act. *See* pp. 3-5, *supra*.<sup>18</sup>

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<sup>18</sup> Because the public liability action is the exclusive means by which someone injured as a result of a nuclear incident may obtain compensation, it makes no difference whether the plaintiff invokes the Act or ignores it. A plaintiff whose injury is alleged to have resulted from the nuclear risk may not "waive" his federal action and pursue state law recovery, since to do so would frustrate the aspect of the Price-Anderson Act which protects private participants in the nuclear power industry. Similarly, a plaintiff may not have access to the federally-created financial protection system unless his injury is alleged to have resulted from the nuclear risk. A plaintiff alleging that he dropped a heavy fuel rod on his foot, breaking a bone, would not have access to the financial protection funds; a plaintiff alleging a cancer from exposure to radiation from that same fuel rod would not be able to obtain and execute upon a state or federal court judgment apart from the financial protection system.

In terms of Article III jurisprudence, then, whether or not a plaintiff's complaint precipitates operation of the "financial protection system" will "for[m] an original ingredient in every cause." *Osborn*, 22 U.S. at 824; *see also* A-83. The provisions of the Price-Anderson Act do not "merely concern access to the federal courts." *Verlinden*, 461 U.S. at 496. They will always determine who pays, and they may determine whether anyone pays.<sup>19</sup> They will determine which claims are governed by state law rules, and which are governed by federal rules of decision "derived from" state rules not "inconsistent" with the federal compensation scheme. They will determine which claims are subject to the cap on liability, whether non-licensees are protected by the channelling provisions, and whether the retrospective premium provisions will apply. Congress may "secure . . . a trial in the federal courts," *Osborn*, 22 U.S. at 822, for persons whose liability Congress has imposed, capped, or channeled entirely to others.

Apart from the structural changes effected by the Act, resolution of the question of due care in public liability actions will almost certainly involve the application of federal safety regulations, whether be-

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<sup>19</sup> For example, an action barred by the statute of limitations of the incident-state might be barred completely, even if the statute of limitations to be applied would otherwise have been that of the state in which the action had been commenced. *Cf. Bonner v. Chevron U.S.A.*, 668 F.2d 817 (5th Cir. 1982). The "precautionary evacuation" (*see* 42 U.S.C. § 2014(gg)) creates a remedy unknown at common law (the essence of a "public nuisance" at common law is that the general public cannot recover for it). The omnibus insurance and indemnity will eliminate contribution and indemnity claims which often dominate other "toxic tort" litigations. *See also* n.22, *infra*.

cause of preemption, as the majority below believed (see A-91 to A-96), or because the state law is found to incorporate the federal standard, as two district courts have found,<sup>20</sup> or because the federal standard is considered evidence of due care.

Additional federal ingredients will necessarily be present in every public liability action, because Section 2014(hh) requires that the court hearing that action "derive" the "substantive rules for decision" from the law of the state where the nuclear incident occurred, unless such state law is "inconsistent" with provisions of the federal scheme. Thus, in applying this federal statute, the trial court must first determine what rules of decision are "substantive" within the meaning of the statute. That is a federal question.<sup>21</sup> Having made that decision, the court must then compare the substantive rules of decision of the in-

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<sup>20</sup> See *Coley v. Commonwealth Edison Co.*, 768 F. Supp. 625 (N.D. Ill. 1991); *Hennessy v. Commonwealth Edison Co.*, 764 F. Supp. 495, 501 (N.D. Ill. 1991); *O'Conner v. Commonwealth Edison Co.*, 748 F. Supp. 672, 678 (C.D. Ill. 1990).

<sup>21</sup> It is doubtful that the body of law following *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), will provide a ready source of answers. The policies and purposes of the Price-Anderson Act are not those of *Erie* and the Rules of Decision Act. For example, the proper conflict-of-laws rule will be the one that best effectuates Congress' intent in the Price-Anderson Act. Compare the concurrence below, A-104 (Amendments Act requires court "to apply the law of the state where the nuclear incident occurred, even if state law would otherwise look to the law of some other state") with *Richards v. United States*, 369 U.S. 1, 7, 10 (1962) (under Federal Tort Claims Act: conflict-of-law rule of the state where negligent act occurred) and with *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (under Rules of Decision Act: conflict-of-law rule of forum state).

cident state with the compensation provisions of the Price-Anderson Act, to determine whether there is any inconsistency. That is also a federal question.<sup>22</sup> As such, these questions must be decided in light of the text, structure and purpose of the Price-Anderson Act, in its larger context as part of the Atomic Energy Act.

Finally, under Congress' decision to "derive" rules of decision from the law of the incident-state (which in and of itself leaves considerable room for the exercise of judgment by the court), state law applies in a public liability action only because Congress adopted it as federal law. As the court below found, "Congress intended that the rules of decision constitute federal law." A-87; *see also* A-85 to A-87.<sup>23</sup>

When Congress determines that the content of rules of decision needed to fill out its program are to be derived from state law, as it did in the Amendments

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<sup>22</sup> The possible areas in which the question of inconsistency may arise are manifold. For example, should claims for loss of consortium, assuming state law permits them, be compensable under the Act's definition of "bodily injury, sickness, disease, or death;" should claims for increased risk of future injury be presently compensable, which the laws of some states permit, when the federal compensation scheme expressly directs that funds be held in reserve for "possible latent injury claims which may not be discovered until a later time," 42 U.S.C. § 2210(o)(1)(C), and provides a discovery rule for limitations of actions. *Id.* § 2210(n)(1). *See also* n.19, *supra*.

<sup>23</sup> Congress modelled the "derived from" provision in the Amendments Act on the Outer Continental Shelf Lands Act. *See* H.R. Rep. 104, 100th Cong., 1st Sess., pt. 1, at 18 (1987). This Court has not questioned Art. III "arising under" jurisdiction under that Act. *See Rodrigue v. Aetna Casualty & Sur. Co.*, 395 U.S. 352 (1969); *see also* A-86 to A-87.



Act, it is exercising its legislative authority to regulate under Art. I. It makes a "basic legislative decision . . . to conform the [federal] laws . . . to the local laws . . . ." *United States v. Sharpnack*, 355 U.S. 286, 293 (1958) (rejecting delegation attack on Federal Assimilative Crimes Act).<sup>24</sup>

There are good reasons why Congress made such a choice in the Amendments Act. A principal purpose of Congress was to secure the efficient determination of public liability actions. To secure those goals, it made perfect sense for Congress to refer to well developed state law tort rules with which both counsel and the courts would already be familiar. It is not because of congressional default or indifference that state law found not to be "inconsistent" was selected to provide the content of the federal rules of decision. The incorporation of state rules into the larger federal matrix of Congress' program was an affirmative choice to serve an identified federal goal.

Contrary to Petitioners' assertion (Pet. 13), what is involved here is not the general question whether, because an adoptive statute is a legislative act of Congress under Art. I, it is *without more* a law of the United States under Art. III. For here, as in *Verlinden*, there is more.<sup>25</sup> As already described, Con-

<sup>24</sup> The statement in *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900), quoted by Petitioners (Pet. 14) was with reference to the federal question statute, not Art. III. See 177 U.S. at 506 ("The question . . . is not one of the power of Congress, but of its intent.").

<sup>25</sup> Because *Verlinden* found that specific federal questions were necessarily involved in suits under the Foreign Sovereign Immunities Act, it did not reach the question whether the adoptive provisions of that Act would separately satisfy Art. III. See 461 U.S. at 495 n.22.



gress has occupied the field of nuclear safety regulation, and altered the opportunity for recovery and the incidence of liability through the compensation scheme.

Moreover, in the Amendments Act, Congress decided upon a national policy of uniform treatment for all persons injured in the same nuclear incident. To achieve this policy, Congress chose not simply a federal forum but a single forum, by conferring venue only in the district court in the district where the incident occurred. Uniformity would in fact be unlikely if multiple courts were deriving federal rules of decision by separately determining what elements in the law of the incident-state were "substantive" and not "inconsistent" with the Price-Anderson Act; separately identifying or attempting to predict state law as to those elements; and otherwise making myriad rulings in the course of multiple, separately conducted litigations. "With the federal jurisdiction and removal provisions . . . Congress ensured that all claims resulting from a given nuclear incident would be governed by the same law . . ." A-88; *see also* A-98 to A-99. The combination of jurisdiction and venue provisions is necessary to realize the substantive federal policy of uniformity.<sup>26</sup>

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<sup>26</sup> The Petition is not correct when it asserts that "Congress's interest in uniformity is belied by its grant of concurrent rather than exclusive jurisdiction." Pet. 15 n.5. That there is concurrent jurisdiction does not reduce the importance of the policy of uniformity. *See Verlinden*, 461 U.S. at 497 (under statute that, like the Amendments Act, retained concurrent jurisdiction, "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting

(continued)

It is in the context of these substantive federal purposes that Congress authorized courts to “derive” a federal rule of decision from state law. This is not an adoptive statute without more. Congress’ express, deliberate adoption of state law as federal law in the Amendments Act satisfies the requirement of Art. III “arising under” jurisdiction that a case arise under federal law. There is no novel or difficult Art. III question requiring review by this Court.

### III. THE RETROACTIVITY ISSUE DOES NOT WARRANT REVIEW.

The court below observed that Petitioners’ argument concerning the retroactive application of the jurisdictional grant was “skeletal,” (A-96), and the Petition here fails to show any reason why this Court should review the question. In upholding the retroactive feature of the Amendments Act, the court below applied standard principles, and made, as those principles require, a determination that is highly specific to this statute. The decision below is not in conflict with a decision in any other circuit. *See* A-99.<sup>27</sup>

Petitioners assert that the decision below is contrary to this Court’s decisions in two cases, each of

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results . . .”). Congress could reasonably expect that when multiple public liability actions arising out of the same incident are brought in multiple courts, the defendant (or the NRC) could ordinarily be counted on to remove to the designated federal court, thereby avoiding the risks and burdens of litigation in multiple courts. By contrast, no one plaintiff has an interest in uniformity as such.

<sup>27</sup> The issue of retroactive application of the removal provision cannot arise with frequency in the future, because, other than the instant cases, there are only a limited number of pending public liability actions that were filed before the Amendments Act.

which, however, *upheld* retroactive applications of federal statutes. *Chicago & N.W. Ry. v. Whitton*, 80 U.S. (13 Wall.) 270 (1872), affirmed retroactive application of a removal statute. And the court below applied the test stated in the more recent case, *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), namely, whether the retroactive application "is supported by a legitimate legislative purpose furthered by rational means." A-97 to A-98 (quoting 467 U.S. at 729). The court found that test satisfied here, in view of Congress' purposes to promote uniform and equitable treatment of victims and the orderly distribution of funds. A-98 to A-99.

Finally, Petitioners assert that the Amendments Act "may" violate the separation of powers by "directing the federal courts to find that a federal cause of action arising under the constitution exists in these cases." Pet. 15 n.6. But the Amendments Act states only that public liability actions arise under Section 2210, the compensation provisions of the Act. 42 U.S.C. § 2014(hh). Congress did not seek in any way to limit judicial authority to decide the constitutionality of its jurisdictional grant or the outcome of any public liability action. Therefore, the Amendments Act does not present separation of powers concerns.

# CONCLUSION

For the foregoing reasons, the Petition should be denied.

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Dated: January 10, 1992

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## APPENDIX



## § 2012. Congressional findings

The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

(b) Repealed. Pub. L. 88-489, § 1, Aug. 26, 1964, 78 Stat. 602.

(c) The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

(f) The necessity for protection against possible interstate damage occurring from the operation of facilities for the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this chapter.

(g) Funds of the United States may be provided for the development and use of atomic energy under conditions which will provide for the common defense and security and promote the general welfare.



(h) Repealed. Pub. L. 88-489, § 2, Aug. 26, 1964, 78 Stat. 602.

(i) In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United States may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

### **§ 2013. Purpose of chapter**

It is the purpose of this chapter to effectuate the policies set forth above by providing for—

(a) a program of conducting, assisting, and fostering research and development in order to encourage maximum scientific and industrial progress;

(b) a program for the dissemination of unclassified scientific and technical information and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress;

(c) a program for Government control of the possession, use, and production of atomic energy and special nuclear material, whether owned by the Government or others, so directed as to make the maximum contribution to the common defense and security and the national welfare, and to provide continued assurance of the Government's ability to enter into and enforce agreements with nations or groups of nations for the control of special nuclear materials and atomic weapons;

(d) a program to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public;

(e) a program of international cooperation to promote the common defense and security and to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defense and security will permit; and

(f) a program of administration which will be consistent with the foregoing policies and programs, with international arrangements, and with agreements for cooperation, which will enable the Congress to be currently informed so as to take further legislative action as may be appropriate.

#### **§ 2014. Definitions**

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

(a) The term "agency of the United States" means the executive branch of the United States, or any Government agency, or the legislative branch of the United States, or any agency, committee, commission, office, or other establishment in the legislative branch, or the judicial branch of the United States, or any office, agency, committee, commission, or other establishment in the judicial branch.

(b) The term "agreement for cooperation" means any agreement with another nation or regional defense organization authorized or permitted by sections 2074, 2077, 2094, 2112, 2121(c), 2133, 2134, or 2164 of this title, and made pursuant to section 2153 of this title.

(c) The term "atomic energy" means all forms of energy released in the course of nuclear fission or nuclear transformation.

(d) The term "atomic weapon" means any device utilizing atomic energy, exclusive of the means for transporting or propelling the device (where such means is a separable

and divisible part of the device), the principal purpose of which is for use as, or for development of, a weapon, a weapon prototype, or a weapon test device.

(e) The term "byproduct material" means (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

(f) The term "Commission" means the Atomic Energy Commission.

(g) The term "common defense and security" means the common defense and security of the United States.

(h) The term "defense information" means any information in any category determined by any Government agency authorized to classify information, as being information respecting, relating to, or affecting the national defense.

(i) The term "design" means (1) specifications, plans, drawings, blueprints, and other items of like nature; (2) the information contained therein; or (3) the research and development data pertinent to the information contained therein.

(j) The term "extraordinary nuclear occurrence" means any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines to be substantial, and which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines has resulted or will probably result in substantial damages to persons offsite or property offsite. Any determination by the Nuclear Regulatory Commission or the

Secretary of Energy, as appropriate, that such an event has, or has not, occurred shall be final and conclusive, and no other official or any court shall have power or jurisdiction to review any such determination. The Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, shall establish criteria in writing setting forth the basis upon which such determination shall be made. As used in this subsection, "offsite" means away from "the location" or "the contract location" as defined in the applicable Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, indemnity agreement, entered into pursuant to section 2210 of this title.

(k) The term "financial protection" means the ability to respond in damages for public liability and to meet the costs of investigating and defending claims and settling suits for such damages.

(l) The term "Government agency" means any executive department, commission, independent establishment, corporation, wholly or partly owned by the United States of America which is an instrumentality of the United States, or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government.

(m) The term "indemnitor" means (1) any insurer with respect to his obligations under a policy of insurance furnished as proof of financial protection; (2) any licensee, contractor or other person who is obligated under any other form of financial protection, with respect to such obligations; and (3) the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, with respect to any obligation undertaken by it in indemnity agreement entered into pursuant to section 2210 of this title.

(n) The term "international arrangement" means any international agreement hereafter approved by the Congress or any treaty during the time such agreement or

treaty is in full force and effect, but does not include any agreement for cooperation.

(o) The term "Joint Committee" means the Joint Committee on Atomic Energy.

(p) The term "licensed activity" means an activity licensed pursuant to this chapter and covered by the provisions of section 2210(a) of this title.

(q) The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material: *Provided, however,* That as the term is used in section 2210(l) of this title, it shall include any such occurrence outside the United States: *And provided further,* That as the term is used in section 2210(d) of this title, it shall include any such occurrence outside the United States if such occurrence involves source, special nuclear, or byproduct material owned by, and used by or under contract with, the United States: *And provided further,* That as the term is used in section 2210(c) of this title, it shall include any such occurrence outside both the United States and any other nation if such occurrence arises out of or results from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material licensed pursuant to subchapters V, VI, VII, and IX of this chapter, which is used in connection with the operation of a licensed stationary production or utilization facility or which moves outside the territorial limits of the United States in transit from one person licensed by the Nuclear Regulatory Commission to another person licensed by the Nuclear Regulatory Commission.

(r) The term "operator" means any individual who manipulates the controls of a utilization or production facility.

(s) The term "person" means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Commission, any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.

(t) The term "person indemnified" means (1) with respect to a nuclear incident occurring within the United States or outside the United States as the term is used in section 2210(c) of this title, and with respect to any nuclear incident in connection with the design, development, construction, operation, repair, maintenance, or use of the nuclear ship Savannah, the person with whom an indemnity agreement is executed or who is required to maintain financial protection, and any other person who may be liable for public liability or (2) with respect to any other nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any contract with the Secretary of Energy or any project to which indemnification under the provisions of section 2210(d) of this title has been extended or under any subcontract, purchase order, or other agreement, of any tier, under any such contract or project.

(u) The term "produce", when used in relation to special nuclear material, means (1) to manufacture, make, produce, or refine special nuclear material; (2) to separate special nuclear material from other substances in which such material may be contained; or (3) to make or to produce new special nuclear material.

(v) The term "production facility" means (1) any equipment or device determined by rule of the Commission to



be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

(w) The term "public liability" means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or a precautionary evacuation), except: (i) claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; and (iii) whenever used in subsections (a), (c), and (k) of section 2210 of this title, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs. "Public liability" also includes damage to property of persons indemnified: *Provided*, That such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

(x) The term "research and development" means (1) theoretical analysis, exploration, or experimentation; or (2) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes.

(y) The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or



(3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title.

(z) The term "source material" means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

(aa) The term "special nuclear material" means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

(bb) The term "United States" when used in a geographical sense includes all territories and possessions of the United States, the Canal Zone and Puerto Rico.

(cc) The term "utilization facility" means (1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

(dd) The terms “high-level radioactive waste” and “spent nuclear fuel” have the meanings given such terms in section 10101 of this title.

(ee) The term “transuranic waste” means material contaminated with elements that have an atomic number greater than 92, including neptunium, plutonium, americium, and curium, and that are in concentrations greater than 10 nanocuries per gram, or in such other concentrations as the Nuclear Regulatory Commission may prescribe to protect the public health and safety.

(ff) The term “nuclear waste activities”, as used in section 2210 of this title, means activities subject to an agreement of indemnification under subsection (d) of such section, that the Secretary of Energy is authorized to undertake, under this chapter or any other law, involving the storage, handling, transportation, treatment, or disposal of, or research and development on, spent nuclear fuel, high-level radioactive waste, or transuranic waste, including (but not limited to) activities authorized to be carried out under the Waste Isolation Pilot Project under section 213 of Public Law 96-164 (93 Stat. 1265).

(gg) The term “precautionary evacuation” means an evacuation of the public within a specified area near a nuclear facility, or the transportation route in the case of an accident involving transportation of source material, special nuclear material, byproduct material, high-level radioactive waste, spent nuclear fuel, or transuranic waste to or from a production or utilization facility, if the evacuation is—

- (1) the result of any event that is not classified as a nuclear incident but that poses imminent danger of bodily injury or property damage from the radiological properties of source material, special nuclear material, byproduct material, high-level radioactive waste, spent nuclear fuel, or transuranic waste, and causes an evacuation; and

(2) initiated by an official of a State or a political subdivision of a State, who is authorized by State law to initiate such an evacuation and who reasonably determined that such an evacuation was necessary to protect the public health and safety.

(hh) The term "public liability action", as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

(jj) <sup>1</sup> LEGAL COSTS.—As used in section 2210 of this title, the term "legal costs" means the costs incurred by a plaintiff or a defendant in initiating, prosecuting, investigating, settling, or defending claims or suits for damage arising under such section.

## **§ 2210. Indemnification and limitation of liability**

### **(a) Requirement of financial protection for licensees**

Each license issued under section 2133 or 2134 of this title and each construction permit issued under section 2235 of this title shall, and each license issued under section 2073, 2093, or 2111 of this title may, for the public purposes cited in section 2012(i) of this title, have as a condition of the license a requirement that the licensee have and maintain financial protection of such type and in such amounts as the Nuclear Regulatory Commission (in this section referred to as the "Commission") in the exercise of its licensing and regulatory authority and responsibility shall require in accordance with subsection (b) of this section to cover public liability claims. Whenever such financial protection is required, it may be a further

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<sup>1</sup> So in original. There is no subsec. (ii).

condition of the license that the licensee execute and maintain an indemnification agreement in accordance with subsection (c) of this section. The Commission may require, as a further condition of issuing a license, that an applicant waive any immunity from public liability conferred by Federal or State law.

**(b) Amount and type of financial protection for licensees**

(1) The amount of primary financial protection required shall be the amount of liability insurance available from private sources, except that the Commission may establish a lesser amount on the basis of criteria set forth in writing, which it may revise from time to time, taking into consideration such factors as the following: (A) the cost and terms of private insurance, (B) the type, size, and location of the licensed activity and other factors pertaining to the hazard, and (C) the nature and purpose of the licensed activity: *Provided*, That for facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the amount of primary financial protection required shall be the maximum amount available at reasonable cost and on reasonable terms from private sources (excluding the amount of private liability insurance available under the industry retrospective rating plan required in this subsection). Such primary financial protection may include private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination of such measures and shall be subject to such terms and conditions as the Commission may, by rule, regulation, or order, prescribe. The Commission shall require licensees that are required to have and maintain primary financial protection equal to the maximum amount of liability insurance available from private sources to maintain, in addition to such primary financial protection, private liability insurance available under an industry retrospective rating plan providing for premium charges deferred in whole or major

part until public liability from a nuclear incident exceeds or appears likely to exceed the level of the primary financial protection required of the licensee involved in the nuclear incident: *Provided*, That such insurance is available to, and required of, all of the licensees of such facilities without regard to the manner in which they obtain other types or amounts of such primary financial protection: *And provided further*, That the maximum amount of the standard deferred premium that may be charged a licensee following any nuclear incident under such a plan shall not be more than \$63,000,000 (subject to adjustment for inflation under subsection (t) of this section), but not more than \$10,000,000 in any 1 year, for each facility for which such licensee is required to maintain the maximum amount of primary financial protection: *And provided further*, That the amount which may be charged a licensee following any nuclear incident shall not exceed the licensee's pro rata share of the aggregate public liability claims and costs (excluding legal costs subject to subsection (o)(1)(D) of this section, payment of which has not been authorized under such subsection) arising out of the nuclear incident. Payment of any State premium taxes which may be applicable to any deferred premium provided for in this chapter shall be the responsibility of the licensee and shall not be included in the retrospective premium established by the Commission.

(2)(A) The Commission may, on a case by case basis, assess annual deferred premium amounts less than the standard annual deferred premium amount assessed under paragraph (1)—

(i) for any facility, if more than one nuclear incident occurs in any one calendar year; or

(ii) for any licensee licensed to operate more than one facility, if the Commission determines that the financial impact of assessing the standard annual deferred premium amount under paragraph (1) would

result in undue financial hardship to such licensee or the ratepayers of such licensee.

(B) In the event that the Commission assesses a lesser annual deferred premium amount under subparagraph (A), the Commission shall require payment of the difference between the standard annual deferred premium assessment under paragraph (1) and any such lesser annual deferred premium assessment within a reasonable period of time, with interest at a rate determined by the Secretary of the Treasury on the basis of the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the date that the standard annual deferred premium assessment under paragraph (1) would become due.

(3) The Commission shall establish such requirements as are necessary to assure availability of funds to meet any assessment of deferred premiums within a reasonable time when due, and may provide reinsurance or shall otherwise guarantee the payment of such premiums in the event it appears that the amount of such premiums will not be available on a timely basis through the resources of private industry and insurance. Any agreement by the Commission with a licensee or indemnitor to guarantee the payment of deferred premiums may contain such terms as the Commission deems appropriate to carry out the purposes of this section and to assure reimbursement to the Commission for its payments made due to the failure of such licensee or indemnitor to meet any of its obligations arising under or in connection with financial protection required under this subsection including without limitation terms creating liens upon the licensed facility and the revenues derived therefrom or any other property or revenues of such licensee to secure such reimbursement and consent to the automatic revocation of any license.

(4)(A) In the event that the funds available to pay valid claims in any year are insufficient as a result of the lim-



itation on the amount of deferred premiums that may be required of a licensee in any year under paragraph (1) or (2), or the Commission is required to make reinsurance or guaranteed payments under paragraph (3), the Commission shall, in order to advance the necessary funds—

(i) request the Congress to appropriate sufficient funds to satisfy such payments; or

(ii) to the extent approved in appropriation Acts, issue to the Secretary of the Treasury obligations in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be agreed to by the Commission and the Secretary of the Treasury.

(B) Except for funds appropriated for purposes of making reinsurance or guaranteed payments under paragraph (3), any funds appropriated under subparagraph (A)(i) shall be repaid to the general fund of the United States Treasury from amounts made available by standard deferred premium assessments, with interest at a rate determined by the Secretary of the Treasury on the basis of the current average market yield on outstanding marketable obligations of the United States of comparable maturities during the month preceding the date that the funds appropriated under such subparagraph are made available.

(C) Except for funds appropriated for purposes of making reinsurance or guaranteed payments under paragraph (3), redemption of obligations issued under subparagraph (A)(ii) shall be made by the Commission from amounts made available by standard deferred premium assessments. Such obligations shall bear interest at a rate determined by the Secretary of the Treasury by taking into consideration the average market yield on outstanding marketable obligations to the United States of comparable maturities during the month preceding the issuance of the obligations under this paragraph. The Secretary of the Treasury shall purchase any issued obligations, and for



such purpose the Secretary of the Treasury may use as a public debt transaction the proceeds from the sale of any securities issued under chapter 31 of title 31, and the purposes for which securities may be issued under such chapter are extended to include any purchase of such obligations. The Secretary of the Treasury may at any time sell any of the obligations acquired by the Secretary of the Treasury under this paragraph. All redemptions, purchases, and sales by the Secretary of the Treasury of obligations under this paragraph shall be treated as public debt transactions of the United States.

**(c) Indemnification of licenses by Nuclear Regulatory Commission**

The Commission shall, with respect to licenses issued between August 30, 1954, and August 1, 2002, for which it requires financial protection of less than \$560,000,000, agree to indemnify and hold harmless the licensee and other persons indemnified, as their interest may appear, from public liability arising from nuclear incidents which is in excess of the level of financial protection required of the licensee. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed \$500,000,000 excluding costs of investigating and settling claims and defending suits for damage: *Provided, however,* That this amount of indemnity shall be reduced by the amount that the financial protection required shall exceed \$60,000,000. Such a contract of indemnification shall cover public liability arising out of or in connection with the licensed activity. With respect to any production or utilization facility for which a construction permit is issued between August 30, 1954, and August 1, 2002, the requirements of this subsection shall apply to any license issued for such facility subsequent to August 1, 2002.

**(d) Indemnification of contractors by Department of Energy**

(1)(A) In addition to any other authority the Secretary of Energy (in this section referred to as the "Secretary") may have, the Secretary shall, until August 1, 2002, enter into agreements of indemnification under this subsection with any person who may conduct activities under a contract with the Department of Energy that involve the risk of public liability and that are not subject to financial protection requirements under subsection (b) of this section or agreements of indemnification under subsection (c) or (k) of this section.

(B)(i)(I) Beginning 60 days after August 20, 1988, agreements of indemnification under subparagraph (A) shall be the exclusive means of indemnification for public liability arising from activities described in such subparagraph, including activities conducted under a contract that contains an indemnification clause under Public Law 85-804 [50 U.S.C. 1431 et seq.] entered into between August 1, 1987, and August 20, 1988.

(II) The Secretary may incorporate in agreements of indemnification under subparagraph (A) the provisions relating to the waiver of any issue or defense as to charitable or governmental immunity authorized in subsection (n)(1) of this section to be incorporated in agreements of indemnification. Any such provisions incorporated under this subclause shall apply to any nuclear incident arising out of nuclear waste activities subject to an agreement of indemnification under subparagraph (A).

(ii) Public liability arising out of nuclear waste activities subject to an agreement of indemnification under subparagraph (A) that are funded by the Nuclear Waste Fund established in section 10222 of this title shall be compensated from the Nuclear Waste Fund in an amount not to exceed the maximum amount of financial protection required of licensees under subsection (b) of this section.

(2) In agreements of indemnification entered into under paragraph (1), the Secretary may require the contractor to provide and maintain financial protection of such a type and in such amounts as the Secretary shall determine to be appropriate to cover public liability arising out of or in connection with the contractual activity, and shall indemnify the persons indemnified against such claims above the amount of the financial protection required, to the full extent of the aggregate public liability of the persons indemnified for each nuclear incident, including such legal costs of the contractor as are approved by the Secretary.

(3)(A) Notwithstanding paragraph (2), if the maximum amount of financial protection required of licensees under subsection (b) of this section is increased by the Commission, the amount of indemnity, together with any financial protection required of the contractor, shall at all times remain equal to or greater than the maximum amount of financial protection required of licensees under subsection (b) of this section.

(B) The amount of indemnity provided contractors under this subsection shall not, at any time, be reduced in the event that the maximum amount of financial protection required of licensees is reduced.

(C) All agreements of indemnification under which the Department of Energy (or its predecessor agencies) may be required to indemnify any person, shall be deemed to be amended, on August 20, 1988, to reflect the amount of indemnity for public liability and any applicable financial protection required of the contractor under this subsection on August 20, 1988.

(4) Financial protection under paragraph (2) and indemnification under paragraph (1) shall be the exclusive means of financial protection and indemnification under this section for any Department of Energy demonstration reactor licensed by the Commission under section 5842 of this title.

(5) In the case of nuclear incidents occurring outside the United States, the amount of the indemnity provided by the Secretary under this subsection shall not exceed \$100,000,000.

(6) The provisions of this subsection may be applicable to lump sum as well as cost type contracts and to contracts and projects financed in whole or in part by the Secretary.

(7) A contractor with whom an agreement of indemnification has been executed under paragraph (1)(A) and who is engaged in activities connected with the underground detonation of a nuclear explosive device shall be liable, to the extent so indemnified under this subsection, for injuries or damage sustained as a result of such detonation in the same manner and to the same extent as would a private person acting as principal, and no immunity or defense founded in the Federal, State, or municipal character of the contractor or of the work to be performed under the contract shall be effective to bar such liability.

**(e) Limitation on aggregate public liability**

(1) The aggregate public liability for a single nuclear incident of persons indemnified, including such legal costs as are authorized to be paid under subsection (o)(1)(D) of this section, shall not exceed—

(A) in the case of facilities designed for producing substantial amounts of electricity and having a rated capacity of 100,000 electrical kilowatts or more, the maximum amount of financial protection required of such facilities under subsection (b) of this section (plus any surcharge assessed under subsection (o)(1)(E) of this section);

(B) in the case of contractors with whom the Secretary has entered into an agreement of indemnification under subsection (d) of this section, the maximum amount of financial protection required under subsection (b) of this section or the amount of

indemnity and financial protection that may be required under paragraph (3) of subsection (d) of this section, whichever amount is more; and

(C) in the case of all other licensees of the Commission required to maintain financial protection under this section—

(i) \$500,000,000, together with the amount of financial protection required of the licensee; or

(ii) if the amount of financial protection required of the licensee exceeds \$60,000,000, \$560,000,000 or the amount of financial protection required of the licensee, whichever amount is more.

(2) In the event of a nuclear incident involving damages in excess of the amount of aggregate public liability under paragraph (1), the Congress will thoroughly review the particular incident in accordance with the procedures set forth in subsection (i) of this section and will in accordance with such procedures, take whatever action is determined to be necessary (including approval of appropriate compensation plans and appropriation of funds) to provide full and prompt compensation to the public for all public liability claims resulting from a disaster of such magnitude.

(3) No provision of paragraph (1) may be construed to preclude the Congress from enacting a revenue measure, applicable to licensees of the Commission required to maintain financial protection pursuant to subsection (b) of this section, to fund any action undertaken pursuant to paragraph (2).

(4) With respect to any nuclear incident occurring outside of the United States to which an agreement of indemnification entered into under the provisions of subsection (d) of this section is applicable, such aggregate public liability shall not exceed the amount of \$100,000,000, together with the amount of financial protection required of the contractor.

**(f) Collection of fees by Nuclear Regulatory Commission**

The Commission or the Secretary, as appropriate, is authorized to collect a fee from all persons with whom an indemnification agreement is executed under this section. This fee shall be \$30 per year per thousand kilowatts of thermal energy capacity for facilities licensed under section 2133 of this title: *Provided*, That the Commission or the Secretary, as appropriate, is authorized to reduce the fee for such facilities in reasonable relation to increases in financial protection required above a level of \$60,000,000. For facilities licensed under section 2134 of this title, and for construction permits under section 2235 of this title, the Commission is authorized to reduce the fee set forth above. The Commission shall establish criteria in writing for determination of the fee for facilities licensed under section 2134 of this title, taking into consideration such factors as (1) the type, size, and location of facility involved, and other factors pertaining to the hazard, and (2) the nature and purpose of the facility. For other licenses, the Commission shall collect such nominal fees as it deems appropriate. No fee under this subsection shall be less than \$100 per year.

**(g) Use of services of private insurers**

In administering the provisions of this section, the Commission or the Secretary, as appropriate, shall use, to the maximum extent practicable, the facilities and services of private insurance organizations, and the Commission or the Secretary, as appropriate, may contract to pay a reasonable compensation for such services. Any contract made under the provisions of this subsection may be made without regard to the provisions of section 5 of title 41 upon a showing by the Commission or the Secretary, as appropriate, that advertising is not reasonably practicable and advance payments may be made.



### **(h) Conditions of agreements of indemnification**

The agreement of indemnification may contain such terms as the Commission or the Secretary, as appropriate, deems appropriate to carry out the purposes of this section. Such agreement shall provide that, when the Commission or the Secretary, as appropriate, makes a determination that the United States will probably be required to make indemnity payments under this section, the Commission or the Secretary, as appropriate, shall collaborate with any person indemnified and may approve the payment of any claim under the agreement of indemnification, appear through the Attorney General on behalf of the person indemnified, take charge of such action, and settle or defend any such action. The Commission or the Secretary, as appropriate, shall have final authority on behalf of the United States to settle or approve the settlement of any such claim on a fair and reasonable basis with due regard for the purposes of this chapter. Such settlement shall not include expenses in connection with the claim incurred by the person indemnified.

### **(i) Compensation plans**

(1) After any nuclear incident involving damages that are likely to exceed the applicable amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1) of this section, the Secretary or the Commission,<sup>3</sup> as appropriate, shall—

(A) make a survey of the causes and extent of damage; and

(B) expeditiously submit a report setting forth the results of such survey to the Congress, to the Representatives of the affected districts, to the Senators of the affected States, and (except for information that will cause serious damage to the national defense

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<sup>3</sup> So in original. Probably should be "Commission,".



of the United States) to the public, to the parties involved, and to the courts.

(2) Not later than 90 days after any determination by a court, pursuant to subsection (o) of this section, that the public liability from a single nuclear incident may exceed the applicable amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1) of this section the President shall submit to the Congress—

(A) an estimate of the aggregate dollar value of personal injuries and property damage that arises from the nuclear incident and exceeds the amount of aggregate public liability under subsection (e)(1) of this section;

(B) recommendations for additional sources of funds to pay claims exceeding the applicable amount of aggregate public liability under subparagraph (A), (B), or (C) of subsection (e)(1) of this section, which recommendations shall consider a broad range of possible sources of funds (including possible revenue measures on the sector of the economy, or on any other class, to which such revenue measures might be applied);

(C) 1 or more compensation plans, that either individually or collectively shall provide for full and prompt compensation for all valid claims and contain a recommendation or recommendations as to the relief to be provided, including any recommendations that funds be allocated or set aside for the payment of claims that may arise as a result of latent injuries that may not be discovered until a later date; and

(D) any additional legislative authorities necessary to implement such compensation plan or plans.

(3)(A) Any compensation plan transmitted to the Congress pursuant to paragraph (2) shall bear an identification number and shall be transmitted to both Houses of Con-

gress on the same day and to each House while it is in session.

(B) The provisions of paragraphs (4) through (6) shall apply with respect to consideration in the Senate of any compensation plan transmitted to the Senate pursuant to paragraph (2).

(4) No such compensation plan may be considered approved for purposes of subsection (e)(2) of this section unless between the date of transmittal and the end of the first period of sixty calendar days of continuous session of Congress after the date on which such action is transmitted to the Senate, the Senate passes a resolution described in paragraph 6<sup>4</sup> of this subsection.

(5) For the purpose of paragraph (4) of this subsection—

(A) continuity of session is broken only by an adjournment of Congress sine die; and

(B) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of the sixty-day calendar period.

(6)(A) This paragraph is enacted—

(i) as an exercise of the rulemaking power of the Senate and as such it is deemed a part of the rules of the Senate, but applicable only with respect to the procedure to be followed in the Senate in the case of resolutions described by subparagraph (B) and it supersedes other rules only to the extent that it is inconsistent therewith; and

(ii) with full recognition of the constitutional right of the Senate to change the rules at any time, in the

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<sup>4</sup> So in original. Probably should be “(6)”.

same manner and to the same extent as in the case of any other rule of the Senate.

(B) For purposes of this paragraph, the term "resolution" means only a joint resolution of the Congress the matter after the resolving clause of which is as follows: "That the \_\_\_\_ approves the compensation plan numbered \_\_\_\_ submitted to the Congress on \_\_\_\_, 19 \_\_\_\_.", the first blank space therein being filled with the name of the resolving House and the other blank spaces being appropriately filled; but does not include a resolution which specifies more than one compensation plan.

(C) A resolution once introduced with respect to a compensation plan shall immediately be referred to a committee (and all resolutions with respect to the same compensation plan shall be referred to the same committee) by the President of the Senate.

(D)(i) If the committee of the Senate to which a resolution with respect to a compensation plan has been referred has not reported it at the end of twenty calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of such resolution or to discharge the committee from further consideration with respect to such compensation plan which has been referred to the committee.

(ii) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same compensation plan), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(iii) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another

motion to discharge the committee be made with respect to any other resolution with respect to the same compensation plan.

(E)(i) When the committee has reported, or has been discharged from further consideration of, a resolution, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(ii) Debate on the resolution referred to in clause (i) of this subparagraph shall be limited to not more than ten hours, which shall be divided equally between those favoring and those opposing such resolution. A motion further to limit debate shall not be debatable. An amendment to, or motion to recommit, the resolution shall not be in order, and it shall not be in order to move to reconsider the vote by which such resolution was agreed to or disagreed to.

(F)(i) Motions to postpone, made with respect to the discharge from committee, or the consideration of a resolution or motions to proceed to the consideration of other business, shall be decided without debate.

(ii) Appeals from the decision of the Chair relating to the application of the rules of the Senate to the procedures relating to a resolution shall be decided without debate.

#### **(j) Contracts in advance of appropriations**

In administering the provisions of this section, the Commission or the Secretary, as appropriate, may make contracts in advance of appropriations and incur obligations without regard to sections 1341, 1342, 1349, 1350, and 1351, and subchapter II of chapter 15, of title 31.

**(k) Exemption from financial protection requirement for nonprofit educational institutions**

With respect to any license issued pursuant to section 2073, 2093, 2111, 2134(a), or 2134(c) of this title, for the conduct of educational activities to a person found by the Commission to be a nonprofit educational institution, the Commission shall exempt such licensee from the financial protection requirement of subsection (a) of this section. With respect to licenses issued between August 30, 1954, and August 1, 2002, for which the Commission grants such exemption:

(1) the Commission shall agree to indemnify and hold harmless the licensee and other persons indemnified, as their interests may appear, from public liability in excess of \$250,000 arising from nuclear incidents. The aggregate indemnity for all persons indemnified in connection with each nuclear incident shall not exceed \$500,000,000, including such legal costs of the licensee as are approved by the Commission;

(2) such contracts of indemnification shall cover public liability arising out of or in connection with the licensed activity; and shall include damage to property of persons indemnified, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs; and

(3) such contracts of indemnification, when entered into with a licensee having immunity from public liability because it is a State agency, shall provide also that the Commission shall make payments under the contract on account of activities of the licensee in the same manner and to the same extent as the Commission would be required to do if the licensee were not such a State agency.

Any licensee may waive an exemption to which it is entitled under this subsection. With respect to any production

or utilization facility for which a construction permit is issued between August 30, 1954, and August 1, 2002, the requirements of this subsection shall apply to any license issued for such facility subsequent to August 1, 2002.

**(I) Presidential commission on catastrophic nuclear accidents**

(1) Not later than 90 days after August 20, 1988, the President shall establish a commission (in this subsection referred to as the "study commission") in accordance with the Federal Advisory Committee Act (5 U.S.C. App.) to study means of fully compensating victims of a catastrophic nuclear accident that exceeds the amount of aggregate public liability under subsection (e)(1) of this section.

(2)(A) The study commission shall consist of not less than 7 and not more than 11 members, who—

- (i) shall be appointed by the President; and
- (ii) shall be representative of a broad range of views and interests.

(B) The members of the study commission shall be appointed in a manner that ensures that not more than a mere majority of the members are of the same political party.

(C) Each member of the study commission shall hold office until the termination of the study commission, but may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

(D) Any vacancy in the study commission shall be filled in the manner in which the original appointment was made.

(E) The President shall designate one of the members of the study commission as chairperson, to serve at the pleasure of the President.

(3) The study commission shall conduct a comprehensive study of appropriate means of fully compensating victims

of a catastrophic nuclear accident that exceeds the amount of aggregate public liability under subsection (e)(1) of this section, and shall submit to the Congress a final report setting forth—

(A) recommendations for any changes in the laws and rules governing the liability or civil procedures that are necessary for the equitable, prompt, and efficient resolution and payment of all valid damage claims, including the advisability of adjudicating public liability claims through an administrative agency instead of the judicial system;

(B) recommendations for any standards or procedures that are necessary to establish priorities for the hearing, resolution, and payment of claims when awards are likely to exceed the amount of funds available within a specific time period; and

(C) recommendations for any special standards or procedures necessary to decide and pay claims for latent injuries caused by the nuclear incident.

(4)(A) The chairperson of the study commission may appoint and fix the compensation of a staff of such persons as may be necessary to discharge the responsibilities of the study commission, subject to the applicable provisions of the Federal Advisory Committee Act (5 U.S.C. App.) and title 5.

(B) To the extent permitted by law and requested by the chairperson of the study commission, the Administrator of General Services shall provide the study commission with necessary administrative services, facilities, and support on a reimbursable basis.

(C) The Attorney General, the Secretary of Health and Human Services, and the Director of the Federal Emergency Management Agency shall, to the extent permitted by law and subject to the availability of funds, provide the study commission with such facilities, support, funds and



services, including staff, as may be necessary for the effective performance of the functions of the study commission.

(D) The study commission may request any Executive agency to furnish such information, advice, or assistance as it determines to be necessary to carry out its functions. Each such agency is directed, to the extent permitted by law, to furnish such information, advice or assistance upon request by the chairperson of the study commission.

(E) Each member of the study commission may receive compensation at the maximum rate prescribed by the Federal Advisory Committee Act (5 U.S.C. App.) for each day such member is engaged in the work of the study commission. Each member may also receive travel expenses, including per diem in lieu of subsistence under sections 5702 and 5703 of title 5.

(F) The functions of the President under the Federal Advisory Committee Act (5 U.S.C. App.) that are applicable to the study commission, except the function of reporting annually to the Congress, shall be performed by the Administrator of General Services.

(5) The final report required in paragraph (3) shall be submitted to the Congress not later than the expiration of the 2-year period beginning on August 20, 1988.

(6) The study commission shall terminate upon the expiration of the 2-month period beginning on the date on which the final report required in paragraph (3) is submitted.

**(m) Coordinated procedures for prompt settlement of claims and emergency assistance**

The Commission or the Secretary, as appropriate, is authorized to enter into agreements with other indemnitors to establish coordinated procedures for the prompt handling, investigation, and settlement of claims for public

liability. The Commission or the Secretary, as appropriate, and other indemnitors may make payments to, or for the aid of, claimants for the purpose of providing immediate assistance following a nuclear incident. Any funds appropriated to the Commission or the Secretary, as appropriate, shall be available for such payments. Such payments may be made without securing releases, shall not constitute an admission of the liability of any person indemnified or of any indemnitor, and shall operate as a satisfaction to the extent thereof of any final settlement or judgment.

**(n) Waiver of defenses and judicial procedures**

(1) With respect to any extraordinary nuclear occurrence to which an insurance policy or contract furnished as proof of financial protection or an indemnity agreement applies and which—

(A) arises out of or results from or occurs in the course of the construction, possession, or operation of a production or utilization facility,

(B) arises out of or results from or occurs in the course of transportation of source material, byproduct material, or special nuclear material to or from a production or utilization facility,

(C) during the course of the contract activity arises out of or results from the possession, operation, or use by a Department of Energy contractor or subcontractor of a device utilizing special nuclear material or byproduct material,

(D) arises out of, results from, or occurs in the course of, the construction, possession, or operation of any facility licensed under section 2073, 2093, or 2111 of this title, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection (a) of this section,

(E) arises out of, results from, or occurs in the course of, transportation of source material, byproduct material, or special nuclear material to or from any facility licensed under section 2073, 2093, or 2111 of this title, for which the Commission has imposed as a condition of the license a requirement that the licensee have and maintain financial protection under subsection (a) of this section, or

(F) arises out of, results from, or occurs in the course of nuclear waste activities.

the Commission or the Secretary, as appropriate, may incorporate provisions in indemnity agreements with licensees and contractors under this section, and may require provisions to be incorporated in insurance policies or contracts furnished as proof of financial protection, which waive (i) any issue or defense as to conduct of the claimant or fault of persons indemnified, (ii) any issue or defense as to charitable or governmental immunity, and (iii) any issue or defense based on any statute of limitations if suit is instituted within three years from the date on which the claimant first knew, or reasonably could have known, of his injury or damage and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. When so incorporated, such waivers shall be judicially enforceable in accordance with their terms by the claimant against the person indemnified. Such waivers shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages, nor shall such waivers apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant. The waivers authorized in this subsection shall, as to indemnitors, be effective only with respect to those obligations set forth in the insurance

policies or the contracts furnished as proof of financial protection and in the indemnity agreements. Such waivers shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (i) the terms of insurance policies or contracts furnished as proof of financial protection, or indemnity agreements, and (ii) the limit of liability provisions of subsection (e) of this section.

(2) With respect to any public liability action arising out of or resulting from a nuclear incident, the United States district court in the district where the nuclear incident takes place, or in the case of a nuclear incident taking place outside the United States, the United States District Court for the District of Columbia, shall have original jurisdiction without regard to the citizenship of any party or the amount in controversy. Upon motion of the defendant or of the Commission or the Secretary, as appropriate, any such action pending in any State court (including any such action pending on August 20, 1988) or United States district court shall be removed or transferred to the United States district court having venue under this subsection. Process of such district court shall be effective throughout the United States. In any action that is or becomes removable pursuant to this paragraph, a petition for removal shall be filed within the period provided in section 1446 of title 28 or within the 30-day period beginning on August 20, 1988, whichever occurs later.

(3)(A) Following any nuclear incident, the chief judge of the United States district court having jurisdiction under paragraph (2) with respect to public liability actions (or the judicial council of the judicial circuit in which the nuclear incident occurs) may appoint a special caseload management panel (in this paragraph referred to as the "management panel") to coordinate and assign (but not necessarily hear themselves) cases arising out of the nuclear incident, if—

(i) a court, acting pursuant to subsection (o) of this section, determines that the aggregate amount of public liability is likely to exceed the amount of primary financial protection available under subsection (b) of this section (or an equivalent amount in the case of a contractor indemnified under subsection (d) of this section); or

(ii) the chief judge of the United States district court (or the judicial council of the judicial circuit) determines that cases arising out of the nuclear incident will have an unusual impact on the work of the court.

(B)(i) Each management panel shall consist only of members who are United States district judges or circuit judges.

(ii) Members of a management panel may include any United States district judge or circuit judge of another district court or court of appeals, if the chief judge of such other district court or court of appeals consents to such assignment.

(C) It shall be the function of each management panel—

(i) to consolidate related or similar claims for hearing or trial;

(ii) to establish priorities for the handling of different classes of cases;

(iii) to assign cases to a particular judge or special master;

(iv) to appoint special masters to hear particular types of cases, or particular elements or procedural steps of cases;

(v) to promulgate special rules of court, not inconsistent with the Federal Rules of Civil Procedure, to expedite cases or allow more equitable consideration of claims;

(vi) to implement such other measures, consistent with existing law and the Federal Rules of Civil Procedure, as will encourage the equitable, prompt, and efficient resolution of cases arising out of the nuclear incident; and

(vii) to assemble and submit to the President such data, available to the court, as may be useful in estimating the aggregate damages from the nuclear incident.

**(o) Plan for distribution of funds**

(1) Whenever the United States district court in the district where a nuclear incident occurs, or the United States District Court for the District of Columbia in case of a nuclear incident occurring outside the United States, determines upon the petition of any indemnitor or other interested person that public liability from a single nuclear incident may exceed the limit of liability under the applicable limit of liability under subparagraph (A), (B), or (C) of subsection (e)(1) of this section:

(A) Total payments made by or for all indemnitors as a result of such nuclear incident shall not exceed 15 per centum of such limit of liability without the prior approval of such court;

(B) The court shall not authorize payments in excess of 15 per centum of such limit of liability unless the court determines that such payments are or will be in accordance with a plan of distribution which has been approved by the court or such payments are not likely to prejudice the subsequent adoption and implementation by the court of a plan of distribution pursuant to subparagraph (C); and

(C) The Commission or the Secretary, as appropriate, shall, and any other indemnitor or other interested person may, submit to such district court a plan

for the disposition of pending claims and for the distribution of remaining funds available. Such a plan shall include an allocation of appropriate amounts for personal injury claims, property damage claims, and possible latent injury claims which may not be discovered until a later time and shall include establishment of priorities between claimants and classes of claims, as necessary to insure the most equitable allocation of available funds. Such court shall have all power necessary to approve, disapprove, or modify plans proposed, or to adopt another plan; and to determine the proportionate share of funds available for each claimant. The Commission or the Secretary as appropriate, any other indemnitor, and any person indemnified shall be entitled to such orders as may be appropriate to implement and enforce the provisions of this section, including orders limiting the liability of the persons indemnified, orders approving or modifying the plan, orders staying the payment of claims and the execution of court judgments, orders apportioning the payments to be made to claimants, and orders permitting partial payments to be made before final determination of the total claims. The orders of such court shall be effective throughout the United States.

(D) A court may authorize payment of only such legal costs as are permitted under paragraph (2) from the amount of financial protection required by subsection (b) of this section.

(E) If the sum of public liability claims and legal costs authorized under paragraph (2) arising from any nuclear incident exceeds the maximum amount of financial protection required under subsection (b) of this section, any licensee required to pay a standard deferred premium under subsection (b)(1) of this section shall, in addition to such deferred premium, be charged such an amount as is necessary to pay a pro rata



share of such claims and costs, but in no case more than 5 percent of the maximum amount of such standard deferred premium described in such subsection.

(2) A court may authorize the payment of legal costs under paragraph (1)(D) only if the person requesting such payment has—

(A) submitted to the court the amount of such payment requested; and

(B) demonstrated to the court—

(i) that such costs are reasonable and equitable; and

(ii) that such person has—

(I) litigated in good faith;

(II) avoided unnecessary duplication of effort with that of other parties similarly situated;

(III) not made frivolous claims or defenses; and

(IV) not attempted to unreasonably delay the prompt settlement or adjudication of such claims.

#### **(p) Reports to Congress**

(1) The Commission and the Secretary shall submit to the Congress by August 1, 1998, detailed reports concerning the need for continuation or modification of the provisions of this section, taking into account the condition of the nuclear industry, availability of private insurance, and the state of knowledge concerning nuclear safety at that time, among other relevant factors, and shall include recommendations as to the repeal or modification of any of the provisions of this section.

(2) Not later than April 1 of each year, the Commission and the Secretary shall each submit an annual report to the Congress setting forth the activities under this section during the preceding calendar year.

**(q) Limitation on awarding of precautionary evacuation costs**

No court may award costs of a precautionary evacuation unless such costs constitute a public liability.

**(r) Limitation on liability of lessors**

No person under a bona fide lease of any utilization or production facility (or part thereof or undivided interest therein) shall be liable by reason or an interest as lessor of such production or utilization facility, for any legal liability arising out of or resulting from a nuclear incident resulting from such facility, unless such facility is in the actual possession and control of such person at the time of the nuclear incident giving rise to such legal liability.

**(s) Limitation on punitive damages**

No court may award punitive damages in any action with respect to a nuclear incident or precautionary evacuation against a person on behalf of whom the United States is obligated to make payments under an agreement of indemnification covering such incident or evacuation.

**(t) Inflation adjustment**

(1) The Commission shall adjust the amount of the maximum standard deferred premium under subsection (b)(1) of this section not less than once during each 5-year period following August 20, 1988, in accordance with the aggregate percentage change in the Consumer Price Index since—

(A) August 20, 1988, in the case of the first adjustment under this subsection; or

(B) the previous adjustment under this subsection.

(2) For purposes of this subsection, the term "Consumer Price Index" means the Consumer Price Index for all urban consumers published by the Secretary of Labor.

## RESPONDENT'S RULE 29.1 STATEMENT

<u>Respondent</u>	<u>Parent</u>	<u>Subsidiaries Not Wholly Owned</u>
General Public Utilities Corp.	—	—
Jersey Central Power & Light Co.	General Public Utilities Corp.	Saxton Nuclear Experimental Corp.
Metropolitan Edison Co.	General Public Utilities Corp.	Saxton Nuclear Experimental Corp.
Pennsylvania Electric Co.	General Public Utilities Corp.	Saxton Nuclear Experimental Corp.
U.E.& C.-Catalytic, Inc.	United Engineers & Constructors International, Inc.	UME-SMAS  Catalytic Servicios, S.A.  Unico, S.A.

<u>Respondent</u>	<u>Parent</u>	<u>Subsidiaries Not Wholly Owned</u>
McDermott Incorporated	—	Arabian Petroleum Marine Construction Company
	—	B&W Special Projects, Inc.
		Babcock & Wilcox Idaho, Inc. ———
		Construcciones Maritimas Mexicanas, S.A. de C.V.
		Olin Pantex Inc.

<u>Respondent</u>	<u>Parent</u>	<u>Subsidiaries Not Wholly Owned</u>
Babcock & Wilcox Company	McDermott Incorporated	Abhasain Hudson Heat Transfer Co. Ltd.  Babcock & Wilcox Services, Inc.  Diamond Power Specialty Limited  Especialidades Termonecnicas, S.A. de C.V.  KBW Gasification Systems, Inc.  Powersafety International, Inc.
Burns & Roe Enterprises, Inc.	Roe Enterprises, Inc.	Burmot Australia PTY, Limited  Lin & Roe Co., Ltd.  BRINESA, SA
Dresser Industries, Inc.	—	—

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No. 91-676

Supreme Court, U.S.

FEB 5 1992

OFFICE OF THE CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1991

JOHN W. GUMBY, SR. ET AL., PETITIONERS

*v.*

GENERAL PUBLIC UTILITIES CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether 28 U.S.C. 1447(d) bars a court of appeals from hearing an appeal of a certified question under 28 U.S.C. 1292(b), where the question arose in connection with a district court decision that a case should be remanded to state court on the ground that, although a federal statute authorized the removal, that statute was unconstitutional.

2. Whether Congress possessed the power under Article III of the Constitution to confer jurisdiction upon the federal district courts over "public liability actions" under the Price-Anderson Amendments Act of 1988, 42 U.S.C. 2210(n) (2).

3. Whether a statute could constitutionally provide for the removal from state court to federal court of actions pending at the time the statute was enacted.





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**In the Supreme Court of the United States**

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A23-A138) is reported at 940 F.2d 832. The opinion of the district court (Pet. App. A139-A158) is reported at 735 F. Supp. 640.

**JURISDICTION**

The judgment of the court of appeals was entered on July 26, 1991. The petition for a writ of certiorari was filed on October 23, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Under the Price-Anderson Amendments Act of 1988, Pub. L. No. 100-408, 102 Stat. 1066 (the 1988 Amendments), a defendant may remove any pending "public liability action" arising out of or resulting from a nuclear incident to federal district court. 42 U.S.C. 2210(n)(2). These consolidated cases, originally brought in state courts in Pennsylvania, New Jersey, and Mississippi, are public liability actions, see 42 U.S.C. 2014(hh), and arise from alleged radiation leaks from the Three Mile Island Unit 2 (TMI) nuclear plant following the accident that occurred there on March 28, 1979. Plaintiffs in most of these actions brought claims for personal injury. In several actions, plaintiffs brought claims for loss of tourism business. The defendants are owners of TMI, persons responsible for its design, construction, and maintenance, suppliers of equipment used at TMI, and related companies.

1. In light of the strong federal interest in and pervasive regulation of the safety aspects of nuclear power, Congress enacted the Price-Anderson Act, Pub. L. No. 85-256, 71 Stat. 576, in 1957 (the Act) as an amendment to the Atomic Energy Act of 1954, ch. 1073, 68 Stat. 919. Through the Act, Congress sought to encourage private industry to participate in the commercial development of nuclear power by removing the deterrent of potentially unlimited liability that might result from a nuclear incident. Congress also acted to ensure that, in the event of such a nuclear incident, adequate funds would be available to compensate injured persons. See 42 U.S.C. 2012(i)

To accomplish these goals, the Act, as amended, establishes a system of private insurance, industry-



wide financial support, and government indemnity to satisfy "public liability" claims, defined in the Act as "any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation." 42 U.S.C. 2014(w). A "nuclear incident" is "any occurrence \* \* \* causing \* \* \* bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or by-product material." 42 U.S.C. 2014(q).

The Act requires each licensee of a commercial nuclear power reactor to secure and maintain a specified amount of insurance from private sources against public liability claims and to participate in an industry-wide pool that would provide financial support to pay public liability claims from other licensees. 42 U.S.C. 2210(a) and (b). The Act provides that the government will indemnify a licensee for public liability claims that exceed the amount of private insurance and industry-wide financial support, up to an aggregate limit on liability arising from a single incident. 42 U.S.C. 2210(c) and (e).

If aggregate liability exceeds that limit, the Act provides for mechanisms to obtain additional funding and to distribute the available funds equitably. Those mechanisms include requirements that the President formulate and Congress review under expedited procedures a plan to provide for more funds and to distribute available funds equitably. 42 U.S.C. 2210(e)(2) and (i). In addition, the Act provides that, where the aggregate liability limits may be exceeded, the district court in the district where the incident occurred shall limit payments to any single claimant and formulate a plan of compensation to distribute available funds equitably among

current claimants and future claimants whose injuries have not yet become manifest. 42 U.S.C. 2210(o).

In addition to the interrelated insurance, compensation, limitation of liability, and distribution provisions, the Act provides for the channeling of liability to operators of nuclear facilities and away from others who might bear such liability under ordinary tort principles. 42 U.S.C. 2014(t) and (w), 2210(a). See generally *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490, 491 (3d Cir. 1986).

Finally, as amended by the Price-Anderson Amendments Act of 1988, the Act provides for federal jurisdiction over any "public liability action," 42 U.S.C. 2210(n)(2), defined as "any suit asserting public liability." 42 U.S.C. 2014(hh). The Amendments further provide for the choice of law in a public liability action: "the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [42 U.S.C. 2210]." 42 U.S.C. 2014(hh). The Amendments also authorize the removal to federal court of any public liability action pending in a state court at the time of enactment of the Amendments, upon motion of either a defendant, the Nuclear Regulatory Commission (NRC), or the Secretary of Energy. See 42 U.S.C. 2210(n)(2). See generally Pet. App. A81 (summarizing incidents of public liability actions). The net result of the Act, as amended, is thus to assure uniformity, equity, and efficiency in the disposition of claims in suits already filed, as well as those filed in the future.

2. In 1984, prior to the 1988 Amendments, the Third Circuit held in *Stibitz v. General Public Utilities Corp.*, 746 F.2d 993 (1984), cert. denied, 469 U.S. 1214 (1985), that the Act did not provide fed-

eral subject matter jurisdiction over actions filed by plaintiffs arising from the accident at TMI.<sup>1</sup> Following the Third Circuit's remand, the district court returned the pending actions to the state courts either by remand or under applicable state law. Subsequently, other plaintiffs filed hundreds of additional actions in state courts arising from the same subject matter. Pet. App. A37-A39.

3. Following enactment of the 1988 Amendments on August 20, 1988, defendants in cases already pending filed timely motions to remove them to the United States District Court for the Middle District of Pennsylvania. Defendants also removed actions filed subsequently. Pet. App. A40. In November 1988, petitioners asked the district court to remand the actions to the state courts from which they had been removed. Petitioners based their claim, *inter alia*, on the assertion that, although Congress intended to confer federal jurisdiction over public liability actions, such actions exceeded the scope of federal question jurisdiction under Article III of the Constitution. Pet. App. A40. Defendants opposed the remand petitions, as did the United States, which had intervened pursuant to 28 U.S.C. 2403 because the proceedings drew into question the constitutionality of the 1988 Amendments. Pet. App. A40.

Agreeing with petitioners that the federal courts could not constitutionally exercise jurisdiction over

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<sup>1</sup> Prior to enactment of the 1988 Amendments, federal courts had original jurisdiction only over public liability actions "arising out of or resulting from an extraordinary nuclear occurrence." See 42 U.S.C. 2210(n) (2) (1982). See also 42 U.S.C. 2014(j) (defining extraordinary nuclear occurrence). Under the Act, the Nuclear Regulatory Commission has conclusively determined that the TMI accident was not an extraordinary nuclear occurrence. See *Stibitz v. General Public Utilities Corp.*, 746 F.2d at 996 n.3.

public liability actions and that the statute conferring federal jurisdiction over such actions was accordingly unconstitutional, the district court granted petitioners' motion to remand the actions to the state courts in which they had been filed. Pet. App. A139-A140. The district court certified its holding on the constitutionality of the statute for interlocutory appeal under 28 U.S.C. 1292(b). The United States and the defendants filed a petition for permission to take an interlocutory appeal of the district court's determination of that question, and the court of appeals granted such permission by order of July 12, 1990. Pet. App. A41.

4. The court of appeals reversed. Pet. App. A23-A138. Initially, the court determined that it was not barred from exercising appellate jurisdiction in this case by 28 U.S.C. 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." The court noted that both the majority and dissenting opinions in *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), had stated that Congress intended in Section 1447(d) to bar appellate review of district court determinations as to whether removal was authorized by the controlling statute. 423 U.S. at 351; *id.* at 355 (Rehnquist, J., dissenting) (Congress "made the district courts the final arbiters of whether Congress intended that specific actions were to be tried in a federal court."). See Pet. App. A48, A61. The court concluded that Congress did not intend in Section 1447(d) to "make district courts the final arbiters of the constitutionality of federal statutes." Pet. App. A61. Accordingly, the court held that it "[could not] read section 1447(d) to bar appellate review of a district court's decision that the statute which pur-

ports to confer federal jurisdiction is constitutional, where the district court, recognizing the complexity and magnitude of the constitutional question before it, certifies that question for immediate appeal pursuant to 28 U.S.C. § 1292(b)." Pet. App. A64.<sup>2</sup>

Turning to the merits of petitioners' claim that the 1988 Amendments are unconstitutional, the court of appeals rejected petitioners' argument that those Amendments exceeded Congress's power to vest federal courts with jurisdiction over cases arising under the laws of the United States. The court first held that, in "explicitly providing that the 'substantive rules for decision' in public liability actions 'shall be derived from' the law of the state in which the nuclear incident occurred, \* \* \* Congress expressed its intention that state law provides the content of and operates as federal law." Pet. App. A85. Analogizing the 1988 Amendments to numerous other statutes that provide for the use of state rules of decision in federal causes of action, Pet. App. A83-A87, the court found that federal law thus governs public liability actions and such actions come within the scope of Article III "arising under" jurisdiction. Pet. App. A87.

Alternatively, the court of appeals held that even if state law provides the rules of decision *ex proprio vigore* in public liability actions, "there are important federal questions to be resolved which are indispensable ingredients of the public liability action," Pet. App. A96, and such actions therefore come within the Article III grant of federal question jurisdiction. See

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<sup>2</sup> Accordingly, the court did not reach the question whether it would have been appropriate to exercise appellate jurisdiction under 28 U.S.C. 1291 or to issue a writ of mandamus under 28 U.S.C. 1651.

Pet. App. A87-A96. The court stated that "the duty the defendants owe the plaintiffs in tort is dictated by federal law," Pet. App. A91, and also noted that numerous other aspects of federal law are implicated in a public liability case, such as limitations on defenses, restriction of punitive damages, and choice of law. Pet. App. A91.

Finally, the court of appeals sustained the provisions in the 1988 Amendments that authorize application of the statute to cases pending at the time of enactment. The Court rejected petitioners' claims that this procedure violated constitutional principles of federalism, state sovereignty, due process, and equal protection. Pet. App. A96-A99.

In a concurring opinion (Pet. App. A100-A138), Judge Scirica upheld the constitutionality of the Amendments under a test that looks to the likelihood that substantive issues of federal law will arise in a particular class of cases and whether original jurisdiction, as opposed to removal or appellate jurisdiction, is important to the achievement of the purposes Congress sought to achieve. Pet. App. A117-A118, A137. In particular, Judge Scirica found it significant that Congress enacted provisions designed to ensure the equitable allocation of available funds among claimants when the Act's aggregate liability limits are exceeded, including the reservation of funds for claimants whose injuries do not become manifest until long after an accident. Judge Scirica noted that those provisions could achieve their goal only through exercise of original federal jurisdiction over public liability actions. Pet. App. A133-A136.



## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. The court of appeals correctly determined that 28 U.S.C. 1447(d) did not bar it from exercising jurisdiction under 28 U.S.C. 1292(b). Although Section 1447(d) precludes further review of district court decisions concerning the application of jurisdictional statutes to particular cases, that Section should not be read to preclude all review of district court decisions holding that a statute authorizing removal is unconstitutional.<sup>3</sup>

a. Petitioners' primary contention is that the Third Circuit has created an exception to Section 1447(d) for cases in which a district court decides "a question of constitutional proportion," Pet. 11, and that that exception "has rendered meaningless the appellate review prohibition of § 1447(d)." Pet. 8. Petitioners, however, misstate the holding of the court of appeals. The court began its discussion with a precise formulation of the question presented: "whether Congress intended to insulate from review those remand orders which rest on the district court's finding that it lacks subject matter jurisdiction because the statute containing the grant of federal jurisdiction is, itself, unconstitutional." Pet. App.

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<sup>3</sup> Independently, the court of appeals' decision to exercise jurisdiction is supported by the fact that the district court in this case stayed its order granting the motion to remand. The court thus never entered an order remanding these actions to the state courts from which they were removed and a prerequisite for application of 28 U.S.C. 1447(d) is therefore lacking in this case.



A42. The court's holding was similarly precise: Section 1447(d) does not bar "appellate review of a district court's decision that the statute which purports to confer federal jurisdiction is constitutional." Pet. App. A64. And even that holding was qualified: such review is permitted "where the district court, recognizing the complexity and magnitude of the constitutional question before it, certifies that question for immediate appeal pursuant to 28 U.S.C. § 1292(b)." *Ibid.*

In short, the court of appeals addressed a specific question concerning reviewability of district court decisions holding jurisdictional statutes unconstitutional and, even as to that question, limited its "narrow," Pet. App. A64, holding to cases involving interlocutory review of certified questions under 28 U.S.C. 1292(b). Petitioners advance no reason why the court of appeals' holding would be particularly difficult to apply in future cases or would interfere with the normal operation of Section 1447(d) to bar appellate review of remand orders.

Moreover, petitioners cite no prior case in which a district court has remanded a case to state court on the ground that the statute authorizing federal jurisdiction was unconstitutional. The court of appeals itself recognized that the facts giving rise to the reviewability issue in this case are "unique." Pet. App. A53.<sup>4</sup>

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<sup>4</sup> Petitioners assert (Pet. 10) that the decision of the court of appeals conflicts with decisions of other courts of appeals in three other cases, *Richards v. Federated Dep't Stores, Inc.*, 812 F.2d 211 (5th Cir. 1987) (per curiam); *Federal Sav. & Loan Ins. Corp. v. Frument Development Corp.*, 857 F.2d 665 (9th Cir. 1988); *In re Bear River Drainage District*, 267 F.2d 849 (10th Cir. 1959). None of the three cases, however, raised

b. Contrary to petitioners' contention (Pet. 4), the decision below is also consistent with this Court's decision in *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). In *Thermtron*, the Court explained that, under 28 U.S.C. 1447(c), a district court shall order remand "[i]f at any time before final judgment it appears that the case was removed improvidently and without jurisdiction,"<sup>5</sup> and that Section 1447(d) forbids review of remand orders issued pursuant to Section 1447(c). See 423 U.S. at 342-343. But the Court held that, where the district court has based its remand order not on its applica-

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or decided the question presented here. In *Richards*, the court did refer briefly to preclusion of review for "constitutional infirmities," 812 F.2d at 211, but the attempted appeal of the remand order in that case was based on one party's complaint that it had not had a fair opportunity to litigate the remand issue. *Ibid.* There is no indication that the district court based its remand order in *Richards* on a finding that a statute conferring federal jurisdiction was unconstitutional, and *Richards* accordingly casts no light on how the Fifth Circuit would have resolved this case. Similarly, *Fruменти* and *Bear River* both involved attempts to appeal remand orders pursuant to 28 U.S.C. 1292(b), but in both cases the remand was premised on a finding that federal jurisdiction was lacking under the controlling statute, not a holding that that statute was unconstitutional. See *Frumenti*, 857 F.2d at 666-667; *Bear River*, 267 F.2d at 850-851.

<sup>5</sup> In 1988, Congress amended 28 U.S.C. 1447(c), effective November 19, 1988, to provide that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Act of Nov. 19, 1988, Pub. L. No. 100-702, Tit. X, § 1016(c), 102 Stat. 4670. The amended version of Section 1447(c) was in effect at the time of the district court's March 16, 1990 order. The 1988 amendment does not reflect a substantive change that affects resolution of the issue in this case. See *Nasuti v. Scannell*, 906 F.2d 802, 806 n.7 (1st Cir. 1990).

tion of a jurisdictional statute under Section 1447 (c), but on some other factor, Section 1447(d) does not necessarily bar review of that order.

Nothing in *Thermtron* suggests that where the remand is based, as it is here, on a determination that "the controlling statute," 423 U.S. at 345, 351, is itself unconstitutional, Section 1447(d) precludes any review of that determination. As the dissenting opinion in *Thermtron* put it, in enacting Section 1447(d), Congress "made the district courts the final arbiters of *whether Congress intended* that specific actions were to be tried in a federal court." 423 U.S. at 355 (Rehnquist, J., dissenting) (emphasis added). Section 1447(d) insulates from any appellate review district court determinations whether and how a particular jurisdictional statute applies in a given case.

To adopt petitioner's position would be to extend the scope of unreviewable district court decisions dramatically. Because 28 U.S.C. 1447(d) makes remand orders "not reviewable on appeal or otherwise," it bars all review of an order within its scope, including review by the Supreme Court or by any other tribunal reviewing orders issued in the various state proceedings following the district court's remand. See *Metropolitan Cas. Ins. Co. v. Stevens*, 312 U.S. 563, 568 (1941). As a result, if a district court's ruling falls within Section 1447(d), it escapes appellate review altogether. The constitutional validity of a jurisdictional statute could thus depend on the district court—or even the particular district judge—before whom a given case is adjudicated. Although such disuniformity may be tolerable with respect to the application of jurisdictional statutes to given facts, the Third Circuit properly determined that Congress did not intend a similar, and unpredictable, variation in

whether its own jurisdictional enactments are deemed to be constitutional.<sup>6</sup>

2. The court of appeals' determination that Congress acted within its authority under Article III in enacting the jurisdictional provisions of the 1988 Amendments is also correct and does not conflict with any decision of this Court or of any other court of appeals.<sup>7</sup>

The decision below is entirely consistent with this Court's decisions in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), and *Verlinden B.V. v. Central Bank*, 461 U.S. 480 (1983). In *Osborn*, the Court held that under Article III the federal courts "may receive \* \* \* the power of construing every \* \* \* law" that "the Legislature may constitutionally make," and that Congress may vest federal courts with jurisdiction over any case in which "the title or right set up by the party, may be defeated by one construction of the constitution or law[s] of the United States, and sustained by the opposite construction." 22 U.S. (9 Wheat.) at 818, 822). In *Verlinden*, the Court explained that *Osborn* "reflects a broad conception of 'arising under' jurisdiction, according to which Congress may confer on the federal courts jurisdiction

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<sup>6</sup> Indeed, such disuniformity would be particularly unfortunate with respect to the 1988 Price-Anderson Amendments, since uniform adjudication of claims arising from a nuclear accident was the primary basis for Congress's creation of the public liability action. See p. 17, *infra*.

<sup>7</sup> The only other court that has passed on the constitutionality of the 1988 Amendments employed essentially the same reasoning as did the Third Circuit and held the Amendments constitutional. See *O'Conner v. Commonwealth Edison Co.*, 770 F. Supp. 448 (C.D. Ill. 1991).

over any case or controversy that might call for the application of federal law.” 461 U.S. at 492. See also *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 471 (1957) (Frankfurter, J., dissenting); *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 251-252 (1867).

The court of appeals’ decision is faithful to this Court’s pronouncements in *Osborn* and *Verlinden*. Federal jurisdiction in this case is proper both because a public liability action is itself a federal cause of action and because a public liability action necessarily includes numerous federal ingredients.

As the court of appeals noted, “[i]n explicitly providing that the ‘substantive rules for decision’ in public liability actions ‘shall be derived from’ the law of the state in which the nuclear incident occurred, \* \* \* Congress expressed its intention that state law provides the content of and operates as federal law” in a public liability action. Pet. App. A85. As with numerous other federal causes of action that adopt state law in whole or in part, “the power of Congress to confer federal jurisdiction \* \* \* and to give content to the federal law by adopting states rules of decision has never been questioned.”<sup>8</sup> Pet. App. A86. Moreover, unlike other statutes that provide that state law is “to be the law of the United States,” see 43 U.S.C. 1333(a)(2), the 1988 Amendments provide that the substantive rules of decision are merely to be “*derived from* the law of the State in which the

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<sup>8</sup> As the court of appeals noted, the same approach of adopting state rules of decision as federal law has been used, for example, in the Federal Deposit Insurance Act, 12 U.S.C. 1819; the Bankruptcy Reform Act of 1978, 11 U.S.C. 101-1330; 16 U.S.C. 457; the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*; and the Federal Tort Claims Act, 28 U.S.C. 1346(b). Pet. App. A84.

nuclear incident involved occurs," 42 U.S.C. 2014(hh) (emphasis added), thus indicating that the federal law governing public liability actions is distinct from the state rules of decision from which such federal law is "derived."

Even if Congress had made state law directly applicable to public liability actions under the 1988 Amendments, such actions would still contain sufficient federal ingredients to come within Article III "arising under" jurisdiction. Regardless of the precise role, if any, of state law in defining the standard of care in a public liability action, that standard must in each case at least be measured against federal safety standards; in the area of nuclear power, "safety regulation is the exclusive concern of the federal law."<sup>9</sup> *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984); accord *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 208, 212-213 (1983). Moreover, public liability actions will involve numerous other federal ingredients. Choice of law is determined by the 1988 Amendments, not state law.<sup>10</sup> 42 U.S.C. 2014(hh). The limitations period and appropriate venue are governed by federal law. 42 U.S.C. 2210(n)(1) and (2). Federal law restricts the avail-

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<sup>9</sup> See Pet. App. A91 ("the duty the defendants owe the plaintiffs in tort is dictated by federal law"), A93 ("state remedies intact" but federal government retains "exclusive regulatory authority") (emphasis omitted).

<sup>10</sup> This factor could be important in a case like this, where individual claims were brought in the courts of three States, each of which may have different choice of law rules and may thus end up applying different rules of decision.



ability of punitive damages, 42 U.S.C. 2210(s),<sup>11</sup> limits certain defenses where there has been an extraordinary nuclear occurrence, 42 U.S.C. 2210(n)(1), establishes an upper limit of aggregate liability, 42 U.S.C. 2210(e), and provides for sharing of liability in part through the industry-wide rating and financial support system, 42 U.S.C. 2210(b). The Act governs who may ultimately be held liable in a public liability action by channeling all liability to licensees. 42 U.S.C. 2014(t) and (w), 2210(a). Thus, even if the cause of action were seen as arising under state law, many of the incidents of that cause of action will be determined by reference to these federal ingredients.

Finally, as Judge Scirica noted in his concurring opinion, the Act not only limits aggregate liability in the event of a nuclear incident, but also provides a detailed scheme for allocating funds in cases in which that aggregate liability limit threatens to be reached. That scheme provides for congressional, executive, and judicial action to distribute the limited available funds fairly among current claimants and among those whose injuries may not become manifest until a future date. See 42 U.S.C. 2210(e)(2), (i), and (o). It cannot be known in advance of litigation whether the aggregate liability limit will be reached with respect to a particular nuclear incident. The congressional plan to ensure fair allocation of available resources, and in particular the provisions requiring a single district court to be available to allocate funds fairly when the liability limits may be exceeded, 42 U.S.C. 2210(o), can only be accomplished

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<sup>11</sup> The question whether a given form of relief constitutes "punitive damages" is itself a federal question. *Molzof v. United States*, No. 90-838 (Jan. 14, 1992), slip op. 4.



if a federal forum is available for the adjudication of all claims arising from a single incident.

As the House Committee on Energy and Commerce explained,

These measures stem from the desire of Congress for equitable and uniform treatment of victims of a nuclear accident and the need to coordinate all phases of litigation that could result from a large nuclear accident. Moreover, consolidation of claims in a single court would be essential for the orderly distribution of the limited funds available and to assure reservation of sufficient funds for victims whose injuries may not become manifest until long after the accident.

H.R. Rep. No. 104, 100th Cong., 1st Sess. Pt. 1, at 18 (1987). Plaintiffs do not and cannot dispute that Congress, acting pursuant to its Commerce Clause and other powers, may legitimately pursue the goal of closely regulating the liability that may arise from a nuclear incident. Having pursued that goal by enacting the Price-Anderson Act and the 1988 Amendments, Congress may under Article III entrust litigation relating to such incidents to the federal courts.

3. The court of appeals correctly rejected (Pet. App. A96-A99) petitioners' miscellaneous claims that the 1988 Amendments unconstitutionally interfere with state sovereignty and principles of federalism by applying the newly enacted statute to cases pending at the time the Amendments were enacted.<sup>12</sup> As

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<sup>12</sup> The district court in *O'Conner v. Commonwealth Edison Co.*, 770 F. Supp. at 456-457, the only other court to discuss the constitutionality of applying the 1988 Amendments to pending cases, reached the same conclusion as did the Third Circuit here.

the court of appeals observed, petitioners' "arguments with respect to these issues were skeletal." Pet. App. A96. Congress is, of course, empowered to specify that a statute shall apply to pending cases. *United States v. Sperry Corp.*, 493 U.S. 52 (1989). Petitioners' arguments rest upon the proposition that Congress may not deprive state courts of jurisdiction over actions once they have been filed in state court. This Court has repeatedly rejected that proposition, which, if applied consistently, would simply invalidate all removal statutes. See *Tennessee v. Davis*, 100 U.S. 257, 267 (1880); *Railway Co. v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270 (1872). Petitioners offer no reason why those precedents should be re-examined at this time.

### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1992

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No. 91-676

Supreme Court  
FILED

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OFFICE OF THE CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1991

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JOHN W. GUMBY, SR. ET AL., PETITIONERS

v.

GENERAL PUBLIC UTILITIES CORPORATION, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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### QUESTION PRESENTED

The Tariff Act of 1930, as amended, provides for the payment of interest by the government on a refund of "any amount paid as increased or additional duties" following a final computation (*i.e.*, liquidation) of import duties due on merchandise entering the country. 19 U.S.C. 1520(d). The question presented is whether this provision also authorizes payment of interest on any excess of estimated duties deposited at entry that is refunded to the importer after liquidation, even though no "increased or additional duties" have been assessed or collected.



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# In the Supreme Court of the United States

OCTOBER TERM, 1991

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No. 91-918

KALAN INC. AND HOSPITAL CORPORATION  
OF AMERICA, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

---

BRIEF FOR THE UNITED STATES  
IN OPPOSITION

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## OPINIONS BELOW

The decision of the court of appeals in *Kalan, Inc. v. United States* (Pet. App. 1a-10a) is reported at 944 F.2d 847. The decision in *Hospital Corp. of America v. United States (HCA)* (Pet. App. 11a-12a) is unreported. The decision of the Court of International Trade in *Kalan* (Pet. App. 13a-20a) is reported at 752 F. Supp. 455, and the decision in *HCA* (Pet. App. 21a-29a) is reported at 752 F. Supp. 459.

## JURISDICTION

The judgment of the court of appeals was entered in *Kalan* on September 11, 1991, and in *HCA* on September 20, 1991. The petition for a writ of cer-

tiorari was filed on December 6, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. a. Petitioner Kalan Inc. (Kalan) imported plastic key tags from the Republic of Korea. Pet. App. 2a. The Customs Service classified the tags as jewelry and required Kalan to deposit estimated duties at entry based on that classification. *Ibid.* Subsequently, the Customs Service liquidated the entry "as entered."<sup>1</sup> No duty was refunded at the time of liquidation, nor was any increased or additional duty assessed. *Ibid.* Kalan then filed an administrative protest claiming that the key tags were misclassified on entry and should have received a duty-free classification. *Ibid.* After the Court of International Trade (CIT) decided in a related case that the key tags should be reclassified, the Customs Service reliquidated the entry and refunded the deposited duties to Kalan without interest. *Id.* at 2a-3a.

b. The Customs Service denied Kalan's protest requesting payment of interest on the refunded amount, and Kalan then brought this action in the CIT. Kalan argued that, under 19 U.S.C. 1505(c) and 1520(d),<sup>2</sup>

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<sup>1</sup> See 19 U.S.C. 1500. "Liquidation" is "the final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. 159.1

<sup>2</sup> Section 1505(c) provides in full:

Duties determined to be due upon liquidation or reliquidation shall be due 15 days after the date of that liquidation or reliquidation, and unless payment of the duties is received by the appropriate customs officer within 30 days after that date, shall be considered delinquent and bear interest from the 15th day after the date of liquidation or

it was entitled to interest on the amount of estimated duties that were refunded at reliquidation from the date of deposit at entry.<sup>3</sup> The government argued that Section 1520(d) did not provide for interest on duties deposited at entry because Section 1520(d) is expressly limited to interest on refunds of amounts "paid as increased or additional duties under section 1505(c)," and no such amounts had been paid here. Pet. App. 16a-17a.

The CIT held that interest was payable on the refunded amount under Section 1520(d) from the date of liquidation. Pet. App. 13a-20a. Rejecting Kalan's claim for interest from an earlier date, the court held that "section 1520(d) does not grant interest on a refund of estimated duties, paid upon entry of merchandise, from the date of payment of those duties." *Id.* at 15a. In its view, however, upon liquidation, "the duties are no longer estimated," but instead are

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reliquidation at a rate determined by the Secretary of the Treasury.

Section 1520(d) provides in full:

If a determination is made to reliquidate an entry as a result of a protest filed under section 1514 of this title or an application for relief made under subsection (c) (1) of this section, or if reliquidation is ordered by an appropriate court, interest shall be allowed on any amount paid as increased or additional duties under section 1505(c) of this title at the annual rate established pursuant to that section and determined as of the 15th day after the date of liquidation or reliquidation. The interest shall be calculated from the date of payment to the date of (1) the refund, or (2) the filing of a summons under section 2632 of title 28, whichever occurs first.

<sup>3</sup> The government conceded that Kalan was entitled to interest pursuant to 28 U.S.C. 2644 from the filing date of the summons commencing the suit to the date of the refund. Pet. App. 15a.

“‘duties determined to be due upon liquidation,’ within the meaning of section 1505(c).” *Id.* at 16a. On this basis, it held, Kalan was entitled to interest on the entire refunded amount from the date of liquidation. *Id.* at 20a.

c. Both parties appealed, and the Federal Circuit reversed. Pet. App. 1a-10a. The court first noted that under *Library of Congress v. Shaw*, 478 U.S. 310, 314 (1986), an award of interest is barred by sovereign immunity absent an express statutory waiver. Pet. App. 4a-5a. It concluded that there was no such express waiver of sovereign immunity in this case. The court observed that Section 1520(d) authorizes interest only on amounts “paid as increased or additional duties,” which are not the same as excess amount of estimated duties deposited at entry. *Id.* at 5a-6a. The court observed that “Customs assessed and Kalan paid *no* duties, ‘increased’ or ‘additional,’ at liquidation.” Because estimated duties are due at the time of entry, not liquidation, the CIT had erred in ruling that these duties had become “duties determined to be due upon liquidation” within the meaning of Section 1505(c). Pet. App. 5a-6a. The court of appeals also observed that “the sole statutory provision dealing directly with the refund of excess deposits [19 U.S.C. 1520(a)] is silent about the addition of interest.” *Id.* at 6a. The court of appeals then reviewed the legislative history of Sections 1520(d) and 1505(c), finding that it expressly confirmed that “[i]f any excess duties are being refunded, no interest is payable thereon.” Pet. App. 7a (emphasis omitted) (quoting H.R. Rep. No. 1015, 98th Cong., 2d Sess. 67 (1984)).

2. a. Petitioner Hospital Corporation of America (HCA) imported a lithotripter, a medical device that uses sonic shock waves to disintegrate kidney stones.

Pet. App. 22a-23a. HCA deposited the estimated duty at the time of entry, and the entry was liquidated at the amount determined by the entry classification. HCA protested, claiming that the lithotripter should have received a different customs classification. After Customs adopted the classification suggested by HCA, it granted HCA's protest, reliquidated the entry, and refunded the excess amount of duty to HCA without interest. *Id.* at 23a-24a.

b. HCA unsuccessfully protested the failure to pay interest and then filed suit in the CIT. The CIT agreed that HCA was entitled to interest on the refund, holding that, even though HCA made no separate payment at liquidation, it "paid excess duties upon liquidation" because "the estimated duties on deposit with Customs were used to pay what [HCA] was found to owe upon liquidation." Pet. App. 27a. The CIT awarded HCA interest under Section 1520 (d) from the date of liquidation to the date the summons was filed in this action. *Id.* at 27a-28a.<sup>4</sup>

c. Relying on its decision in *Kalan*, the Federal Circuit reversed the award of interest under Section 1520(d). Pet. App. 11a-12a.

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<sup>4</sup> It also awarded HCA interest under 28 U.S.C. 2644 (see note 3, *supra*) from the date of the summons to the date the judgment was paid. Pet. App. 28a-29a.

## ARGUMENT

Congress has conferred exclusive jurisdiction on the Federal Circuit to review decisions of the Court of International Trade, 28 U.S.C. 2645(c), thereby establishing it as the specialized and expert tribunal to resolve issues of the kind presented here. The decisions of the Federal Circuit in these cases are correct and do not conflict with any decision of this Court or any court of appeals. Further review is not warranted.

1. Petitioner argues that the "increased or additional duties" upon which interest is payable to the importer under Section 1520(d) include amounts paid *at entry* over and above the amount determined to be due at liquidation. That position is contrary to the plain language of the statute, which makes clear that interest is due only on amounts paid by the importer after liquidation over and above the amount deposited at entry. Section 1520(d) provides for interest only "on any amount paid as increased or additional duties under section 1505(c)." The terms "increased duties" and "additional duties" are terms of art in tariff law. As defined by the United States Tariff Commission (the predecessor of the International Trade Commission) :

Increased duties are the differences between the estimated duties paid upon entry and any increase of regular duties in the liquidated duties as determined by the collector.

*Dictionary of Tariff Information* 263 (1924). "Additional duties" are those duties "which are assessed in addition to the regular duties accruing under the law." *Ibid.*

The amounts on which interest is payable under Section 1520(d) are those "*paid*" as "increased" or

“additional” duties under Section 1505(c). That Section, in turn, refers to “[d]uties determined to be due *upon liquidation*,” and indicates that those amounts are to be paid on or after liquidation (emphasis added). See Section 1505(c) (the amounts “determined to be due upon liquidation \* \* \* shall be due 15 days *after* \* \* \* liquidation \* \* \* and unless payment of the duties is received \* \* \*, within 30 days *after* that date, shall be considered delinquent”) (emphasis added). Section 1505(b) further provides that the Customs officer “shall collect any increased or additional duties \* \* \* as determined on a liquidation or reliquidation.” Thus, “increased or additional duties” assessed at liquidation are duties that are “collected” following liquidation: those duties are distinct from “estimated duties” deposited, and thus collected, at entry. See 19 U.S.C. 1505(a). In sum, the “increased” or “additional” amounts referred to in Section 1520(d) plainly represent money paid after liquidation, not at entry.<sup>5</sup>

Petitioners are not entitled to interest on their refunds of estimated duty under Section 1520(d) because they did not pay any “increased or additional

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<sup>5</sup> As the court of appeals noted (see p. 4, *supra*), the House Report confirms the plain language of the statute. Petitioners err in relying (Pet. 11) on the statement in the House Report that “[i]nterest would be paid on the amount of overcharge at a rate to be determined by the Secretary of the Treasury and determined as of the 15th day after the date of liquidation or reliquidation.” H.R. Rep. No. 1015, *supra*, at 67. That statement is taken out of context. That portion of the Report addresses the rate and commencement date of the interest, rather than the type of “overcharge” to which interest applies. In any event, the statutory language does not employ the term “overcharge,” but instead expressly specifies that “interest shall be allowed on any amount paid as increased or additional duties.” 19 U.S.C. 1520(d).



duties" either at liquidation or at any other time. The refunds to petitioners were authorized by 19 U.S.C. 1520(a), which provides for the refund of excess duties deposited at entry whenever, as here, "it is ascertained on liquidation or reliquidation" that a lesser amount of duty is due. This Section, unlike Section 1520(d), does not authorize interest on the amounts refunded. In the absence of an express statutory authorization for interest, there can be no award of interest against the government. *Library of Congress v. Shaw*, 478 U.S. 310 (1986).<sup>6</sup>

2. Petitioners argue that the government's interpretation of Section 1520(d) is contrary to Congress's intent because it results in an unfair disparity between the interest Customs pays on overpayments of duty and the interest importers pay on deficiencies in duty payments. Pet. 10-11.

To the contrary, the scheme of reciprocal interest payments is symmetrical and carries out Congress's intent. Section 1505(c) was enacted in 1984 to remedy delays in the payment of increased or additional duties assessed at liquidation. The law was in part a response to the decision in *United States v.*

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<sup>6</sup> In both *Kalan* and *HCA*, the CIT reasoned that the estimated duties deposited by both petitioners at the time of entry later became the duties determined to be due upon liquidation. Pet. App. 16a, 27a. As the Federal Circuit recognized, however, Section 1520(d) authorizes interest only on amounts that are "paid" under Section 1505(c) as "increased or additional duties" after liquidation—which do not include amounts paid at entry. Moreover, the CIT's construction of Section 1520(d) led it to conclude that petitioners were entitled to interest from the date of liquidation. As the Federal Circuit noted (Pet. App. 4a), that result is directly contrary to the language of Section 1520(d), which states that interest "shall be calculated from the date of payment." The only payments petitioners made were at the time of entry.

*Heraeus-Amersil, Inc.*, 671 F.2d 1356 (C.C.P.A. 1982), in which the court barred Customs from initiating efforts to collect those duties until at least 270 days after liquidation. See Pet. App. 8a, 36a-37a. Section 1520(d) was enacted in recognition of "the inherent fairness of a reciprocity of payment of interest when the importer has been able to sustain his position [that a refund is due] in an appropriate forum \* \* \* as regards increased or additional duties." Pet. App. 9a (quoting H.R. Rep. No. 1015, *supra*, at 68).

Thus, Sections 1520(d) and 1505(c) both authorize the payment of interest only on "increased" or "additional" amounts that the importer is required to pay following liquidation—that is, duties over and above amounts deposited at entry. Under Section 1520(d), Customs must pay interest if any such additional payments are subsequently refunded. Under Section 1505(c), the importer pays interest on late payment of additional unpaid amounts found to be due at liquidation. See Pet. App. 8a-9a, 37a. The statute does *not* require the importer to pay interest on deficiencies in estimated payments from the time of entry until the payment of the "increased" or "additional" amounts determined to be due on liquidation, but only from the date those "increased" or "additional" amounts are due until payment is made. Likewise, Customs does not pay interest to importers on refunds of excess estimated duties deposited at entry, but only on "increased" or "additional" duties that are paid to Customs after liquidation and are subsequently refunded. Hence, the scheme Congress enacted operates symmetrically; but, even if it did not, it would still be the scheme that the courts are bound to enforce.

CONCLUSION

The petition for writ of certiorari should be denied.  
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FEBRUARY 1992



No. 91-676

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JOHN W. GUMBY, SR., et al.,

*Petitioners,*

v.

GENERAL PUBLIC UTILITIES CORPORATION, METRO-  
POLITAN EDISON CO., JERSEY CENTRAL POWER AND  
LIGHT CO., PENNSYLVANIA ELECTRIC CO., BABCOCK &  
WILCOX, CO., McDERMOTT INC., U.E. & C.-CATALYTIC,  
INC., BURNS & ROE ENTERPRISES, INC., AND  
DRESSER INDUSTRIES, INC.,

*Respondents.*

REPLY BRIEF IN SUPPORT OF PETITION  
FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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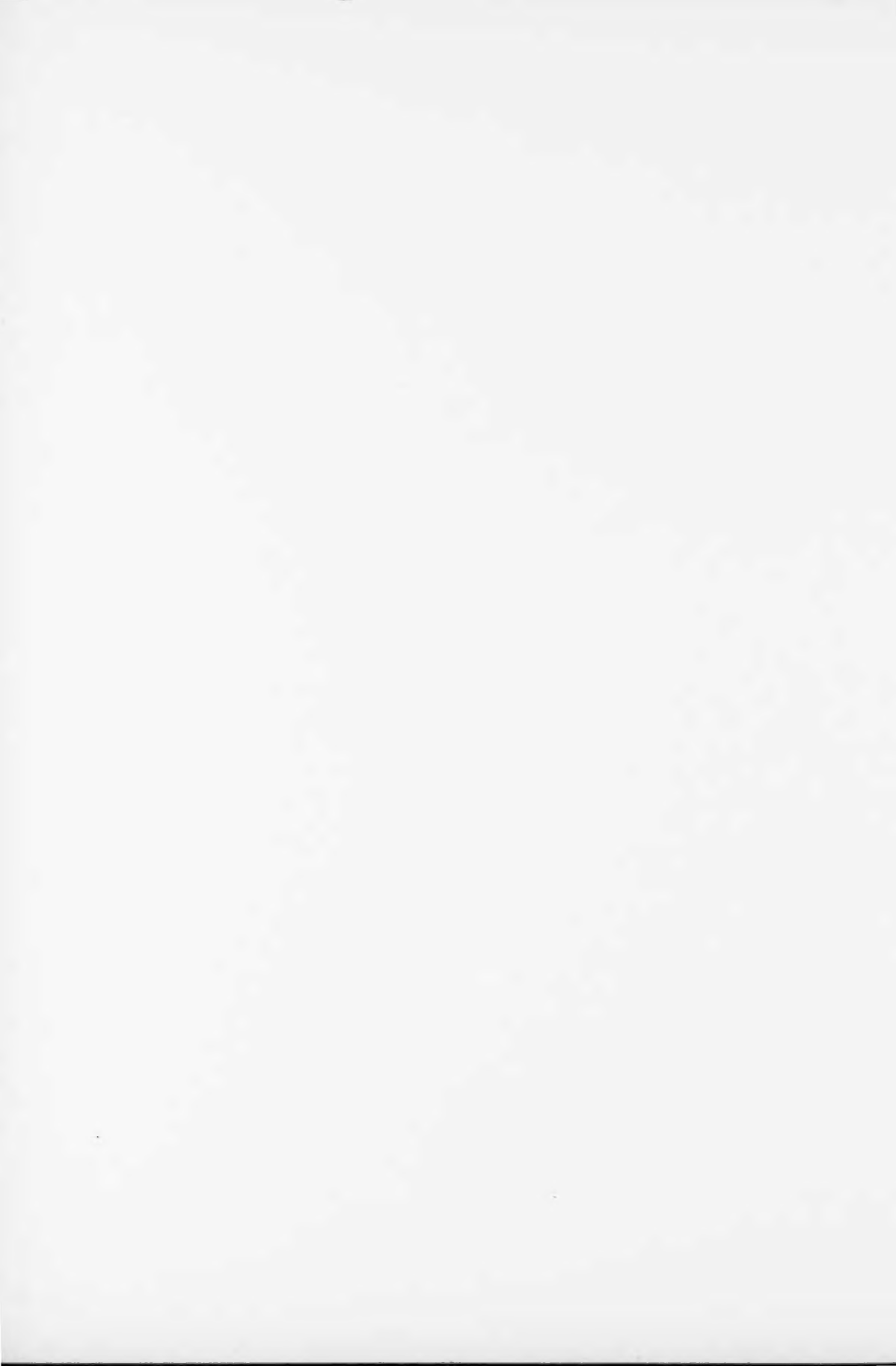
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*Petitioners,*

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*Respondents.*

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**REPLY BRIEF IN SUPPORT OF PETITION  
| FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**I. INTRODUCTION**

Respondents and the United States, in their briefs, spend a significant time contesting the merits of Petitioners' claims. These arguments simply highlight the significant issues raised in this petition and why this Court should grant a Writ of Certiorari. The Third Circuit's expansion of both appellate jurisdiction over remand orders and congressional authority to confer original jurisdiction over state law claims is clearly in conflict with numerous precedent of this Court and other

circuits and threatens the traditional role of the federal judiciary as courts of limited jurisdiction. This brief reply responds to the arguments opposing further review by this Court.

## II. REPLY REASONS FOR ALLOWING WRIT

### A. THE THIRD CIRCUIT'S APPROVAL OF APPELLATE REVIEW FOR REMAND ORDERS CREATES INTER-CIRCUIT CONFLICTS AND CONFLICTS WITH DECISIONS BY THIS COURT

The unambiguous prohibition of 28 U.S.C. §1447(d) forbidding appellate review of remand orders is collapsing. Prior to *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1975), appellate review of remand orders was considered impossible. In light of the Third Circuit's opinion, A23-A138, the limited mandamus exception in *Thermtron* to remand orders outside of the scope of 28 U.S.C. §1447(c), is now overtaking the rule and demands this Court's attention to reverse this trend. Compare *McDermott International, Inc. v. Lloyds Underwriters*, 944 F.2d 1199, 1204 (5th Cir. 1991) (Recognizing an exception under 28 U.S.C. §1291 for contractual remand orders) with *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989) (Rejecting §1291 appeal based on a contractual forum-selection clause).

The Respondents and the United States contend that the exception created by the Third Circuit, pursuant to 28 U.S.C. §1292(b), for appellate review of the district court's remand order, neither conflicts with §1447(d) or *Thermtron*. That is not so. The language of the statute—"not reviewable on appeal or otherwise"—requires no interpretive construction. See *Demarest v. Manspeaker*, — U.S. —, 111 S.Ct. 599, 604 (1991). It means what it says: no appellate review.

The Ninth and Tenth Circuits thus refuse to except from the §1447(d) prohibition certifications under §1292(b). See *In re Bear River Drainage Dist.*, 267 F.2d 849, 851 (10th Cir. 1959); *Fed. Sav. and Loan Ins. Corp. v. Frumentis*, 857 F.2d 665, 669 (9th Cir. 1988). The Fifth Circuit even refuses appellate review of remand orders for "constitutional infir-

mities," an opinion diametrically opposite that of the Third Circuit. See *Richards v. Federated Dept. Stores, Inc.*, 812 F.2d 211 (5th Cir.), *cert. denied*, 484 U.S. 824 (1987). Additionally, the Third Circuit's opinion conflicts with this Court's ruling in *Thermtron*, which requires that the remand order be outside the authority of 28 U.S.C. §1447(c) to escape the bar to appellate review. *Thermtron*, 423 U.S. at 351. This case was remanded on grounds within §1447(c), and the district court so held: "Clearly, the decision to remand the cases at bar is based on §1447(c)." (A154).

The Third Circuit's opinion is plainly at odds with other Circuit Court of Appeals' decisions, this Court's opinions, and with the long-standing Congressional intent to make the district courts the final arbiters of whether "specific actions were to be tried in a federal court." *Thermtron*, 423 U.S. at 355 (Rehnquist, J., dissenting). Because the Third Circuit's expansion of appellate jurisdiction over remand orders conflicts with the foundational underpinnings of removal jurisdiction, review of this judicial repeal of §1447(d) should be exercised.

#### **B. THE THIRD CIRCUIT'S APPROVAL OF CONGRESSIONAL AUTHORITY TO CONFER ORIGINAL JURISDICTION OVER STATE LAW CLAIMS CONFLICTS WITH DECISIONS BY THIS COURT**

The Respondents and the United States responded to this petition by defending the Third Circuit's opinion on the merits. They argue that the Price-Anderson Amendments Act of 1988 (the "Amendments") was more than a jurisdictional grant because it created an "overlay of federal law" (A91) and that the Third Circuit's opinion corresponds with *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) and *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983). Petitioners disagree. These two decisions do not sustain this result and the Third Circuit's opinion bears this out. It was only with great difficulty that the majority and concurring opinions construed the only two major decisions of this Court to force their results.

The provisions referred to as the "federal overlay" existed in similar form prior to the Amendments in the Price-Anderson Act, yet that same "overlay" was previously found insufficient to create a federal cause of action. See *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 99 (1978)(Rehnquist, J., concurring); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 625 (1984); *Stibitz v. General Public Utilities Corp.*, 746 F.2d 993 (3d Cir. 1984), *cert. denied*, 469 U.S. 1214 (1985); *Kiick v. Metropolitan Edison Co.*, 784 F.2d 490 (3d Cir. 1986). The exceptions to the pre-existing overlay referred to by the Respondents and the United States are the retroactive jurisdictional grant (42 U.S.C. §2014(hh)) and the prospective-only limitation on punitive damages (42 U.S.C. §2210(s)) of the Amendments. Petitioners submit that this mere jurisdictional grant is insufficient to confer original federal jurisdiction and allow removal of state proceedings after years of litigation to a federal forum. See *Verlinden*, *supra*. See also *Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 508 (1900); *Shulthis v. McDougal*, 225 U.S. 561 (1912).

The tensions reflected in these arguments weigh in favor of granting certiorari. Important questions of federal law have still not been decided. Congress cannot simply state the magic words that a public liability action "arises under" federal law and satisfy the Constitutional requirements to create original federal jurisdiction. *Osborn* and *Verlinden* clearly do not dictate this result. Because both cases addressed the Article III power to confer federal question jurisdiction where uniquely federal interests, *i.e.*, the National Bank and foreign relations, existed, neither case supplies a meaningful standard where no obvious or uniquely federal interest exists. As this Court ruled in *Duke Power* that there is no such federal interest with regard to the Price-Anderson Act, the merits of this case are argued in a background devoid of precedent.

Review should therefore be granted because this Court must set a meaningful standard to define the constitutional limits of Congress's ability to confer federal jurisdiction and especially for removal of advanced state proceedings. There is an important constitutional question at stake here, which

only this Court can resolve and the issue is too important for the Court to leave unresolved.

### C. CONGRESS'S RETROACTIVE APPLICATION OF THE AMENDMENTS OFFENDS THE SEPARATION OF POWERS DOCTRINE

The Amendments direct the judiciary to find that these specific cases, which were determined to be state law claims in *Duke Power, supra*, *Stibitz, supra*, *Kiick, supra*, are now federal claims. This contravention of the separation of powers doctrine conflicts with decisions of this Court. See *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 429 (1988) (Rehnquist, J., dissenting). Clearly, Congress lacks the authority to have free and unrestricted power to void state litigation in mid-stream because the state jurisdiction no longer suits the goals of a litigant. This issue is of significant national importance as evidenced by this Court's granting a Writ of Certiorari in *Robertson v. Seattle Audubon Society*, \_\_\_ U.S. \_\_\_, 111 S.Ct. 2886 (1991). Accordingly, this case should likewise be considered for review.

### III. CONCLUSION

For the foregoing reasons and those set forth in Petitioner's opening brief, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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